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IN THE
Supreme Court of the United States

Thomas D. Pinks and Billie Jo Campbell,
Petitioners,

v.

North Dakota,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of North Dakota

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Amendment's Confrontation Clause permits a prosecutor to introduce a state forensic examiner's crime laboratory report against the accused as a substitute for the forensic examiner's live testimony, so long as the accused is left with the ability to subpoena the forensic examiner as part of his defense.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Thomas Pinks and Billie Jo Campbell respectfully petition for a writ of certiorari to the Supreme Court of North Dakota in *State* v. *Campbell*, Nos. 20050326, 20050337, and 20050338.

OPINION BELOW

The opinion of the North Dakota Supreme Court (App. 1a-9a) is reported at 2006 ND 168, 719 N.W.2d 374. The relevant trial court proceedings and order (App. 10a-17a) are unpublished.

JURISDICTION

The North Dakota Supreme Court decision was issued on July 27, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor . . . .".

N.D. Cent. Code § 19-03.1-37 provides in relevant part:

> (4) In all prosecutions under this chapter . . . involving the analysis of a substance or sample thereof, a certified copy of the analytical report signed by the director of the state crime laboratory or the director's designee must be accepted as prima facie evidence of the results of the analytical findings.

> (5) Notwithstanding any statute or rule to the contrary, a defendant who has been found to be indigent by the court in the criminal proceeding at issue may subpoena the director or an employee of the state crime laboratory to testify at the preliminary hearing and trial of the issue at no cost to the defendant. If the director or an employee of the state crime laboratory is subpoenaed to testify by a defendant who is not indigent and the defendant does not call the witness to establish relevant evidence, the court shall order the defendant to pay costs to the witness . . . .

STATEMENT

This case presents a pressing issue concerning the administration of criminal justice in several states across the country, and over which the federal and state courts are deeply fractured.

1. Until quite recent times, this Court and others generally assumed that the Sixth Amendment required the prosecution, absent a stipulation from the defendant, to present the findings of its forensic examiners through live testimony at trial. In 1977, for example, one state court noted that, with the possible exception of chemical analyses of alcohol during the Prohibition era, "we can find no reported cases in which the very identity of the evidence as contraband has been established by hearsay" in a forensic examiner's written report. *State* v. *Henderson*, 554 S.W.2d 117, 120 (Tenn. 1977) (reciting intermediate court's observation). Although some such cases did, in fact, exist, the traditional view unquestionably was that the defendant had a right to a state-orchestrated confrontation with forensic examiners. *See, e.g.*, *United States* v. *Wade*, 388 U.S. 218, 227-28 (1967) (forensic analyses of fingerprints, blood samples, etc.); *Diaz* v. *United States*, 223 U.S. 442, 450

(1912) (autopsy reports). So the Tennessee Supreme Court was on solid ground in holding that:

> [I]n the face of an objection by the person charged, the State can not prove an essential element of a criminal offense by test results introduced through a witness other than the one who conducted the tests. If it were otherwise, the person charged with the offense would be denied his constitutional right to confront witnesses against him.

Henderson, 554 S.W.2d at 122.

However, following *Ohio* v. *Roberts*, 448 U.S. 56 (1980), which conflated the Confrontation Clause with hearsay law, many states began to label crime laboratory reports as "business records" or "public records," thereby rendering them admissible under the Confrontation Clause in place of the live testimony of their creators. *See* Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 508 & n.165 (2006). Even in jurisdictions that resisted characterizing crime laboratory reports as business or public records, many legislatures enacted laws specifically making such reports admissible in the prosecution's cases-in-chief in lieu of live testimony. *See id.* at 514 & n.204. States justified these laws in part on the ground that, even though the laws relieved prosecutors of the need to call forensic examiners as witnesses at trial, the laws still left defendants the ability to subpoena the prosecution's witnesses for cross-examination. *See ibid.*

These departures from traditional practice raised serious constitutional questions even during the *Roberts* era. *See, e.g.*, Paul C. Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 Ohio St. L.J. 671, 674-75 (1988). And these questions have become even more significant in the wake of this Court's clarification in *Crawford* v. *Washington*, 541 U.S. 36 (2004), that "testimonial" hearsay cannot be

introduced against defendants in place of live testimony at trial.

The admissibility of state forensic examiners' crime laboratory reports in lieu of their live testimony turns, in particular, on two sub-questions, each of which deeply divides state and federal courts. First, is the Confrontation Clause automatically satisfied so long as a defendant has the ability to subpoena a witness with respect to whom the prosecution offers out-of-court statements instead of live testimony? Second, if not, are state forensic examiners' assertions in crime laboratory reports "testimonial" hearsay? This case provides an excellent vehicle to resolve both of these questions and, thus, to settle the overall confusion concerning the admissibility of crime laboratory reports as a substitute for (rather than just a supplement to) live testimony.

2. North Dakota, like many other states, currently allows prosecutors to introduce forensic examiners' reports as a "substitute" for their live testimony at trial. App. 6a. Specifically, a North Dakota statute directs courts to admit certified crime laboratory reports analyzing the chemical components of a sample "as prima facie evidence of the results of the analytical findings." N.D. Cent. Code § 19-03.1-37(4). Prosecutors need not present live testimony at trial from the forensic examiners who prepare such reports, even if defendants request that they do so. Instead, the statute leaves it to defendants, if they wish, to "subpoena the director or an employee of the state crime laboratory to testify at . . . trial." *Id.* § 19-03.1-37(5); *see also State* v. *Fischer*, 459 N.W.2d 818, 821 (N.D. 1990) (emphasizing that there is no need for prosecutor to demonstrate unavailability of forensic examiner and that the statute places responsibility on the defendant to call the forensic examiner to the stand if he wants him to testify at trial). If a non-indigent defendant subpoenas the forensic examiner but "does not call the witness to establish relevant evidence," the

statute provides that "the court shall order the defendant to pay costs to the witness." N.D. Cent. Code § 19-03.1-37(5).

3. In January 2005, Petitioners Thomas Pinks and Billie Jo Campbell were carousing at the Lewis and Clark Saloon in Washburn, North Dakota. App. 2a. While at the saloon, Petitioners got into a heated dispute with a bartender, prompting the saloon proprietor to call the police and Petitioners to leave the saloon. *Ibid.* Two police officers followed Petitioners' car and eventually stopped it. *Ibid.* During the stop, one of the officers noticed a pipe in the front part of the vehicle. *Id.* 3a. While there was nothing visible inside the pipe, the officer suspected Petitioners had used it to smoke marijuana. *Ibid.* The officers arrested Petitioners. *Ibid.* In subsequent searches, officers found what they suspected to be marijuana residue in one of Campbell's coat pockets and in a bag located in the back seat of the patrol car that transported Campbell to the police station. *Ibid.*

4. The police officers took the pipe, plastic bag, and residue from Campbell's pocket to the state crime laboratory for testing. *Id.* 12a. A state-employed forensic examiner later issued a report asserting that the residue from all three confiscated items was marijuana. *Id.* 18a-19a. "The report was signed by a state forensic scientist in his official capacity, written on letterhead from the attorney general's office, crime laboratory division, and created for purposes of providing evidence" against Petitioners. *Id.* 5a.

The report is largely conclusory. It does not describe the qualifications or experience of the forensic examiner. It does not indicate whether any recordkeeping or storage measures had been taken to preserve the integrity of the items for testing. Nor does the report identify the testing method the examiner used to arrive at his conclusion or describe any difficulties (and accompanying error rates) associated with testing mere residue for the presence of illegal drugs. *Id.* 18a-19a. The report does, however, provide what the prosecutor needed: a "solemn declaration" from a state

forensic examiner that Petitioners possessed residue of an illegal drug. *Id.* 5a (internal quotation omitted).

The State charged Pinks with possession of marijuana paraphernalia; being in actual physical control of an automobile while under the influence of alcohol or other drugs; and criminal mischief. *Id.* 3a. The State charged Campbell with possession of marijuana and marijuana paraphernalia. *Ibid.* Pinks retained counsel to defend himself, and the trial court appointed counsel to defend Campbell because she is classified under state law as indigent.

5. At trial, the prosecution offered the laboratory report during a police officer's testimony as proof that Petitioners had possessed marijuana residue. *Ibid.* Both Petitioners objected immediately "to the introduction of the report into evidence arguing that the report violated their constitutional right to confrontation because the forensic scientist who authored the report did not testify." *Ibid.* Defense counsel argued: "[T]he contents of that report are testimonial under *Crawford versus Washington*[, 541 U.S. 36 (2004)]. We have a right to confront any lab person who purports to give information in this case." *Id.* 12a. The prosecution responded that *Crawford* did not bar the report's introduction in place of the forensic examiner's live testimony because it fell under "a specific statutory provision that permits the admissibility of a certified copy of a drug lab report." *Ibid.*

Although Petitioners explained to the court that *Crawford*'s core holding was that the right to confrontation does not turn on whether evidence falls within any particular hearsay exception, *id.* 13a (*see also Crawford*, 541 U.S. at 51), the trial court admitted the report, stating without elaboration: "I don't think it is a violation, so the exhibit will be received." *Id.* 16a. Neither party ever called the state forensic examiner to the stand, so report constituted "the primary evidence offered to establish the seized property contained marijuana." *Id.* 5a-6a.

At closing argument, the State summed up the importance of the crime laboratory report to its case against Pinks, stating:

> This could be a normal tobacco pipe. It is not in this case. . . . What makes it paraphernalia is the residue that has been used to smoke marijuana, makes the distinguishment [sic] between a legal product and an illegal product. . . . That was tested and it was used as a marijuana pipe.

Tr. 178, lines 1-9 (June 13, 2005). The forensic report obviously marked the difference between Campbell's guilt and innocence as well. Although the jury acquitted Pinks of the criminal mischief charge, it found him guilty of the two drug-related charges. App. 3a. It found Campbell guilty on both counts against her. *Ibid.*

6. The North Dakota Supreme Court affirmed Petitioners' convictions, albeit disposing of their Confrontation Clause argument on different grounds than had been pressed in the trial court. Contrary to the trial court's apparent view, the North Dakota Supreme Court acknowledged that a forensic examiner's report "certainly has indicia of a testimonial statement." It "bears testimony in the sense that it is a 'solemn declaration or affirmation made for the purpose of establishing or proving some fact'" – here, that "the residue found in the pipe, bag, and Campbell's coat pocket . . . contained marijuana." *Id.* 5a-6a. (quoting *Crawford*, 541 U.S. at 51). The North Dakota Supreme Court nevertheless held that introducing the report as a "substitute for the appearance of [the] witness," *id.* 6a, did not violate Petitioners' confrontation rights "[b]ecause neither Pinks nor Campbell attempted to subpoena the forensic scientist as provided by statute," *id.* 9a. Reasoning that all the Confrontation Clause requires is "the opportunity to confront" the prosecution's witnesses, the court emphasized that "[t]here is nothing in this record to suggest the forensic scientist was unavailable." *Ibid.* Consequently, even though

Petitioners forcefully objected at trial to the prosecution's use of testimonial hearsay as a substitute for live testimony, they had "waived their ability to complain of a constitutional violation" by not themselves subpoenaing the witness to testify in court. *Ibid.*

REASONS FOR GRANTING THE WRIT

The North Dakota Supreme Court's holding that the Confrontation Clause permits prosecutors to introduce state crime laboratory reports, over defendants' objections, as substitutes for live testimony raises two interrelated questions, each of which is the subject of an entrenched conflict among state and federal courts. First, courts are divided over whether a defendant's ability to subpoena a witness obviates the Confrontation Clause's otherwise binding requirement that the prosecution present its case through witnesses' live testimony. Second, courts are divided over whether state crime laboratory reports are testimonial. Because laboratory analyses form an integral part of so many criminal prosecutions, this Court should resolve these conflicts and make clear what the text of the Sixth Amendment and this Court's decision in *Crawford* v. *Washington*, 541 U.S. 36 (2004), so plainly dictate: that absent a defendant's stipulation, a prosecutor may not introduce a state forensic examiner's crime laboratory report in place of the examiner's live testimony at trial – at least absent a showing that the examiner is unavailable to testify and the defendant had a prior opportunity for cross-examination.

I. The North Dakota Supreme Court's Decision Implicates Two Interdependent and Irreconcilable Conflicts Among the Federal and State Courts.

The North Dakota Supreme Court held that the Confrontation Clause permits prosecutors to introduce state

forensic examiners' crime laboratory reports as substitutes for their live testimony, so long as defendants are left with the ability to subpoena the forensic examiners as part of their defenses. This decision implicates two highly significant conflicts in the federal and state courts.

1. State courts of last resort and federal courts of appeals are divided four-to-four in the specific context of state crime laboratory reports – and eleven-to-six overall – over whether a defendant's ability to subpoena a witness obviates the Confrontation Clause's otherwise binding requirement that the prosecution present its case through live witness testimony.

The North Dakota Supreme Court in this case held that "no Sixth Amendment violation can exist" when a defendant has the ability to subpoena a witness, but fails to do so. App. 8a. It based this holding on the premise that all the Confrontation Clause requires is "the opportunity to confront" the prosecution's witnesses. *Id.* 9a. Consequently, even though Petitioners forcefully objected at trial to the prosecution using an out-of-court certification as a substitute for live testimony, the North Dakota Supreme Court ruled that they had "waived their ability to complain of a constitutional violation" by not themselves subpoenaing the witness to testify in court. *Ibid.*; *accord State* v. *Manke*, 328 N.W.2d 799 (N.D. 1982). Three other state high courts likewise have held that defendants' statutory ability to subpoena forensic examiners and others who produce prosecutorial laboratory reports automatically renders the reports constitutionally admissible even without live testimony. *See Howard* v. *United States*, 902 A.2d 127, 135 (D.C. 2006) (defendant "waived his right to confront the chemist" by failing to subpoena him); *State* v. *Hughes*, 713 S.W.2d 58, 62 (Tenn. 1986) ("[T]he accused waives the right of confrontation if the laboratory technician is not

subpoenaed . . . .");[1] *State* v. *Smith*, 323 S.E.2d 316, 328 (N.C. 1984) (a defendant's "[f]ailure to summon the analyst results in a waiver" of right to confrontation because the defendant "is entitled to subpoena the analyst and examine him as an adverse witness").[2]

Two state high courts have issued analogous rulings in the child hearsay context, where prosecutors have offered children's out-of-court interviews in lieu of their live testimony. *See State* v. *Oscarson*, 845 A.2d 337, 347 (Vt. 2004) (prosecution need not call available child witness to

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[1] The Tennessee Court of Criminal Appeals recently reaffirmed that "[t]he rule in *Hughes* controls" in that State. *State* v. *Kemper*, 2004 WL 2218471, at *3 (Tenn. Crim. App. Sept. 30, 2004), *appeal denied* (Tenn. 2005).

[2] The North Dakota Supreme Court asserted that the Nevada Supreme Court's decision in *City of Las Vegas* v. *Walsh*, 124 P.3d 203 (Nev. 2005), *cert. denied*, 126 S. Ct. 1786 (2006), also comported with its holding here. App. 8a. But *Walsh* actually involved a different type of procedural hurdle that a handful of states impose on defendants with respect to requiring forensic examiners to give live testimony – namely, a prerequisite that defendants make a pretrial showing that there is a good faith basis to contest a forensic examiner's report. *See* 124 P.3d at 208. The validity of such "good faith" requirements is not at issue here because, if defendants make such a showing under those statutes, then *the prosecution* must put the forensic examiners on the stand at trial. *See id.* at 208 (discussing Nev. Rev. Stat. § 50.315 (2004)); *see also State* v. *Crow*, 974 P.2d 100 (Kan. 1999). Nor is the validity of so-called "notice and demand" statutes – under which some states require defendants to request a forensic examiner's presence a certain amount of time in advance of trial – at issue here. If such threshold demand requirements are satisfied, then those statutes, like "good faith" provisions, require the examiner to "testify in person at the trial *on behalf of the state*." *State* v. *Caulfield*, ___ N.W.2d ___, 2006 WL 2828676, at *5 (Minn. Oct. 5, 2006) (quoting Minn. Stat. § 634.15 (2006)) (emphasis added). *See generally* Richard D. Friedman, *Lab Reports and a Notice-and-Demand Statute – A Significant Decision from Minnesota*, http://confrontationright.blogspot.com/2006/10/lab-reports-and-notice-and-demand.html (Oct. 6, 2006) (distinguishing notice-and-demand statutes from the type of "defendant must subpoena" requirement at issue here).

the stand because "[t]here is no constitutional requirement that [a prosecution witness] testify on direct"); *State* v. *Schaal*, 806 S.W.2d 659, 663 (Mo. 1991) (Confrontation Clause satisfied because the child was available at trial and "it is only the opportunity for effective cross-examination that must be afforded under the Sixth Amendment"). One other state appellate court also has upheld the prosecution's introduction of a child's videotaped statement in lieu of live testimony because she was available in the courthouse but not called by the defendant to the stand. *See Starr* v. *State*, 604 S.E.2d 297, 299 (Ga. Ct. App. 2004).

In direct contrast to these rulings, three federal courts of appeals and eight state high courts have held that the Confrontation Clause forbids the prosecution from introducing its witnesses' testimony through hearsay and leaving it to defendants to decide whether to subpoena the witnesses. Under these rulings, the prosecution must put its own witnesses on the stand (at least when those witnesses are available) or their hearsay statements are inadmissible. Four of these decisions deal specifically with forensic examiners who prepare crime laboratory reports, six deal with child witnesses, and one deals with another type of witness.

In *People* v. *McClanahan*, 729 N.E.2d 470 (Ill. 2000), for example, the Illinois Supreme Court confronted the prosecution's argument that it legitimately offered a crime laboratory report without live testimony from the forensic examiner who prepared it "because [the defendant] can always subpoena the preparer of the report and cross-examine him as a hostile witness." *Id.* at 477. The court "emphatically reject[ed] any notion that the State's constitutional obligation to confront the accused with the witnesses against him can be satisfied by allowing the accused to bring the State's witnesses into court himself and then cross-examine them as part of his defense." *Ibid.* The Illinois Supreme Court further reasoned that the Sixth Amendment:

> guarantee[s] a defendant the right "to be confronted with the witnesses against him." The wording of th[is] provision[] is significant. [It does] not say that the accused has a right *to confront the witnesses* against him; it say[s] that the accused has a right *to be confronted with* the witnesses against him. This is a mandatory constitutional obligation of the prosecuting authority. It arises automatically at the inception of the adversary process, and no action of the defendant is necessary to activate this constitutional guarantee in his case.

Ibid. (emphasis in original).

Other courts holding the same in this context have followed similar reasoning. *See United States* v. *Oates*, 560 F.2d 45, 82 n.39 (CA2 1977) ("[T]he right of confrontation is broader than the right to cross-examination, and it is the prosecutor who should have the burden of producing witnesses against the defendant.") (internal citations omitted);[3] *State* v. *Coombs*, 821 A.2d 1030, 1033 (N.H. 2003) (the defendant's ability to subpoena a forensic examiner "is beside the point" because "[t]he duty to confront a defendant with witnesses falls upon the State") (internal quotation omitted); *Barnette* v. *State*, 481 So. 2d 788, 792 (Miss. 1985) (it "impermissibly lessens the constitutionally required burden which is on the state to prove each element of the offense beyond a reasonable doubt, and violates the defendant's right of confrontation" to allow a prosecutor, over defendant's objection, to introduce laboratory report in place of live testimony); *Belvin* v. *State*, 922 So. 2d 1046, 1054 (Fla. Dist. Ct. App. 2006) ("Not only does a defendant have no burden to produce constitutionally necessary evidence of guilt, but he has the right to stand silent during the state's case in chief, all the while insisting that the state's proof satisfy constitutional requirements.")

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[3] The Second Circuit reaffirmed this holding in *United States* v. *Check*, 582 F.2d 668, 683 (CA2 1978).

(internal citations omitted), *rev. granted*, 928 So. 2d 336 (Fla. 2006).

Numerous courts in the child hearsay context have been equally emphatic in rejecting the argument that the prosecution may offer its witnesses' testimony through hearsay so long as defendants are left with the ability to subpoena the witnesses for cross-examination. The Washington Supreme Court, for example, has reasoned that:

> The opportunity to cross examine means more than affording the defendant the opportunity to hail the witness to court for examination. It requires the State to elicit the damaging testimony from the witness so the defendant may cross examine if he so chooses.

State v. *Rohrich*, 939 P.2d 697, 700-01 (Wash. 1997) (footnote omitted). The Fifth Circuit has further explained that "the prosecution's initial call for the witness to testify . . . is crucial to the [waiver] inquiry. Only when that is done does the failure of the defense to cross-examine the witness constitute a waiver." *Lowery* v. *Collins*, 996 F.2d 770, 772 (CA5 1993). Other decisions are in accord. *See Schaal* v. *Gammon*, 233 F.3d 1103, 1107 (CA8 2000) ("[T]his type of burden-shifting is impermissible and not sufficient to satisfy the Confrontation Clause."); *Snowden* v. *State*, 867 A.2d 314, 332 (Md. 2005) ("In a criminal trial, the State is required to place the defendant's accusers on the stand so that the defendant both may hear the accusations against him or her stated in open court and have the opportunity to cross-examine those witnesses."); *Long* v. *State*, 742 S.W.2d 302, 321 (Tex. Crim. 1987) (the defendant cannot be "required to call as a witness the accuser in order to enjoy the fundamental right of cross-examination"), *overruled on other grounds*, *Briggs* v. *State*, 789 S.W.2d 918 (Tex. Crim. 1990).[4] Courts have held similarly with respect

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[4] *See also Bratton* v. *State*, 156 S.W.3d 689, 694 (Tex. App.) ("[W]e find nothing in *Crawford* or elsewhere suggesting that a defendant waives his right to confront a witness whose testimonial statement was admitted into

to other types of witnesses. *See State* v. *Fisher*, 563 P.2d 1012, 1018 (Kan. 1977) ("[F]or the declarant to be subject to full and effective cross-examination by the defendant, he must be called to testify by the state."); *State* v. *Cox*, 876 So. 2d 932, 938 (La. Ct. App. 2004) ("Defendant should not be required to call Mrs. Sykes as a witness simply to facilitate the State's introduction of evidence against the Defendant.").

The fact that the Eighth Circuit falls in the group requiring the prosecution to present its case through live witness testimony makes this Court's review especially necessary here. *See Schaal*, 233 F.3d at 1106-07 (granting habeas relief because state court's "waiver" analysis unconstitutionally shifted burden to defendant to call prosecution's witness). Under the current state of affairs, defendants in federal court in North Dakota can force prosecutors to put their witnesses on the stand, while defendants in state court cannot. Worse yet, if state prosecutors proceed under the decision at issue here, any convictions are subject to federal habeas corpus challenge. This type of uncertainty – in and of itself – strongly militates in favor of certiorari review.

2. State and federal courts also are split over the question of whether state crime laboratory reports are testimonial. This Court's conception of the Confrontation Clause in *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980), allowed trial courts to admit out-of-court statements as evidence against criminal defendants if the statements fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." *Crawford* abrogated *Roberts*, holding that "[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" *Crawford*, 541 U.S. at 61. "Testimonial" hearsay statements, therefore, are admis-

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evidence by failing to call him as a witness at trial."), *rev denied* (Tex. Crim. 2005).

sible only if the witness is "unavailable to testify, and the defendant had [] a prior opportunity for cross-examination." *Id.* at 54. Although this Court elected to "leave for another day any effort to spell out a comprehensive definition of 'testimonial,'" *id.* at 68, – and did so again last Term in *Davis* v. *Washington*, 126 S. Ct. 2266 (2006), – it noted that a paradigmatic testimonial statement is a "solemn declaration or affirmation made for the purpose of establishing or proving some fact" in a criminal trial. *Crawford*, 541 U.S. at 51 (internal quotation omitted).

Drawing on this language, the North Dakota Supreme Court observed that "the forensic scientist's report bears testimony in the sense that it is a 'solemn declaration or affirmation made for the purpose of establishing or proving some fact'" – namely, "establishing [that] the content of the residue" the police seized from Petitioners and purportedly provided to the forensic examiner was marijuana. App. 5a (quoting *Crawford*, 541 U.S. at 51) (internal quotation and citation omitted). Although the court stopped short of squarely holding that state laboratory reports are testimonial – resolving the case instead on waiver-by-failure-to-subpoena grounds – seven other courts (including two other state courts of last resort) have used similar reasoning explicitly to hold that such reports are testimonial. *See State* v. *Caulfield*, ___ N.W.2d ___, 2006 WL 2828676, at *3-4 (Minn. Oct. 5, 2006) (state forensic examiner's report identifying substance as an illegal drug is testimonial because it is "clearly prepared for litigation" and "function[s] as the equivalent of testimony on the identification of the substance seized from [the defendant]"); *City of Las Vegas* v. *Walsh*, 124 P.3d 203, 208 (Nev. 2005) (nurse's affidavits authenticating and outlining standard blood-testing procedures are testimonial because "they are made for use at a later trial or legal proceeding"), *cert. denied*, 126 S. Ct. 1786 (2006); *State* v. *Miller*, ___ P.3d ___, 2006 WL 2820978, at *1 (Or. Ct. App. Oct. 4, 2006) (urinalyses and drug residue analysis reports

are testimonial because they are solemn declarations "clearly intended to be used in a criminal prosecution to prove past events"); *State* v. *Rogers*, 780 N.Y.S.2d 393, 397 (N.Y. App. Div. 2004) (blood test was testimonial because it was "initiated by the prosecution and generated by the desire to discover evidence"); *Martin* v. *State*, ___ So. 2d ___, 2006 WL 2482442 (Fla. Dist. Ct. App. Aug. 30, 2006) (drug analysis report);[5] *State* v. *Berezansky*, 899 A.2d 306, 312-13 (N.J. Super. Ct. App. Div. 2006) (laboratory report analyzing blood-alcohol content); *People* v. *Lonsby*, 707 N.W.2d 610 (Mich. Ct. App. 2005) (laboratory report testing for presence of semen), *motion for appeal denied*, 720 N.W.2d 724 (Mich. 2006); *State* v. *Crager*, 844 N.E.2d 390 (Ohio Ct. App. 2005) (DNA test), *appeal allowed,* 846 N.E.2d 533 (Ohio 2006). Two other courts have suggested they agree with this view. *See United States* v. *Rahamin*, 168 Fed. App'x 512, 520 (CA3 2006) (noting drug analysis report "appear[ed] testimonial" but resolving case on harmless-error grounds); *United States* v. *Magyari*, 63 M.J. 123, 127 (C.A.A.F. 2006) (unpublished opinion) (holding a random, administrative urinalysis report is nontestimonial but noting "the same types of records . . . prepared at the behest of law enforcement in anticipation of a prosecution" may be testimonial), *petition for cert. filed* (No. 06-265).

Finally, the New Hampshire Supreme Court likewise has ruled that introducing a crime laboratory report purporting to establish the presence of a controlled substance without live testimony of the forensic examiner violates a defendant's confrontation rights. *See State* v. *Coombs*, 821 A.2d 1030, 1032 (N.H. 2003). Although the New Hampshire Supreme

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[5] Multiple districts of the Florida Court of Appeals have addressed this issue and all have ruled that laboratory reports are testimonial. *See Belvin* v. *State*, 922 So. 2d 1046 (Fla. Dist. Ct. App.) (blood-alcohol breath test), *rev. granted*, 928 So. 2d 336 (2006); *Johnson* v. *State*, 929 So. 2d 4 (Fla. Dist. Ct. App. 2005) (drug identification test), *rev. granted*, 924 So. 2d 810 (Fla. 2006).

Court issued its decision before *Crawford*, it drew heavily on Justice Thomas's concurrence in *White* v. *Illinois*, 502 U.S. 346, 363 (1992), which first advanced the testimonial concept, and reasoned that "a laboratory test used to prove an essential element of a criminal offense constitutes [the type of] *ex parte* affidavit" that the Confrontation Clause was designed to cover. *Coombs*, 821 A.2d at 1032.

On the other hand, one federal court of appeals, three state courts of last resort, and three intermediate state appellate courts have held that prosecutorial laboratory reports like the one at issue here are not testimonial. *See United States* v. *Ellis*, 460 F.3d 920, 925 (CA7 2006) (analysis of bodily fluids for presence of illegal drugs); *Commonwealth* v. *Verde*, 827 N.E.2d 701, 705 (Mass. 2005) (certificate of chemical analysis identifying a sample as an illegal drug); *State* v. *Dedman*, 102 P.3d 628, 636 (N.M. 2004) (blood test for presence of illegal drugs); *State* v. *Forte*, 629 S.E.2d 137, 142-44 (N.C. 2005) (DNA analysis); *Pruitt* v. *State*, ___ So. 2d ___, 2006 WL 1793732 (Ala. Crim. App. June 30, 2006) (certificate of chemical analysis identifying illegal drug); *People* v. *Johnson*, 18 Cal. Rptr. 3d 230, 233 (Cal. Ct. App. 2004) (same); *State* v. *March*, ___ S.W.3d ___, 2006 WL 1791336 (Mo. Ct. App. June 30, 2006) (same).

These courts do not dispute that state crime laboratory reports are solemn declarations designed to create evidence in criminal prosecutions. They reason, however, that these reports are not testimonial for two reasons. First, some courts assert that state crime laboratory reports are "neither discretionary nor based on opinion," and thus are so trustworthy that they do not "implicate the principal evil at which the Confrontation Clause was directed": governmental manipulation of testimony. *Verde*, 827 N.E.2d at 706 (quotation omitted); *see also Pruitt*, ___ So. 2d ___, 2006 WL 1793732, at *5 (forensic reports are "grounded in inherently trustworthy and reliable scientific testing, rather

than opinionated assertions"). Second, some courts have emphasized that many jurisdictions' modern hearsay law treats crime laboratory reports as business records and that this Court stated in passing in *Crawford* that business records – at least as that concept was understood at the Founding – are by their nature nontestimonial. *See Ellis*, 460 F.3d at 925; *Forte*, 360 N.C. at 435.[6]

This conflict over the nature of forensic examiners' state crime laboratory reports is now deeply entrenched. The North Dakota Supreme Court and several other courts have acknowledged this split, and courts now are simply choosing sides. *See, e.g.*, App. 6a-7a; *Caulfield*, ___ N.W.2d at ___, 2006 WL 2828676, at *4; *March*, ___ S.W.3d at ___, 2006 WL 1791336, at *4 n.4. Nothing could be gained from further percolation. Indeed, when these courts' disparate treatment of similarly situated defendants is combined with courts' confusion over whether a defendant's ability to subpoena a forensic examiner can obviate the need to delve into the problem at all, it is clear beyond peradventure that there is no way that the lower courts will untangle the law in this area themselves. It is time for this Court to step in.

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[6] What is more, three state courts of last resort and two intermediate state courts have invoked these same lines of reasoning to hold that autopsy reports used in homicide prosecutions are at least in part nontestimonial. *See State* v. *Craig*, 853 N.E.2d 621, 639 (Ohio 2006) (wholly nontestimonial); *State* v. *Lackey*, 120 P.3d 332, 348-52 (Kan. 2005) (objective observations in autopsy reports are nontestimonial, while "opinions" are testimonial); *Rollins* v. *State*, 897 A.2d 821, 844-46 (Md. 2006) (same); *Moreno Denoso* v. *State*, 156 S.W.3d 166, 182 (Tex. App.) (wholly nontestimonial), *rev. denied* (Tex. Crim. 2005); *People* v. *Durio*, 794 N.Y.S.2d 863, 869 (N.Y. Sup. Ct. 2005) (wholly nontestimonial).

II. The North Dakota Supreme Court's Decision Misconstrues the Confrontation Clause.

Although this Court has never squarely decided the issue, it has explicitly assumed on several occasions that, absent a defendant's stipulation, the prosecution may not introduce a crime laboratory report as a substitute for presenting live testimony from a forensic examiner. As early as 1912, this Court stated that certain pretrial "testimony" including an autopsy report "could not have been admitted without the consent of the accused . . . because the accused was entitled to meet the witnesses face to face . . . ." *Diaz* v. *United States*, 223 U.S. 442, 450 (1912).[7] Years later, this Court noted that when the government performs "scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like[,] . . . the accused has the opportunity for a meaningful confrontation of the Government's case at trial." *United States* v. *Wade*, 388 U.S. 218, 227-28 (1967). Similarly, in refusing to recognize a due process right to have the government preserve breath samples, this Court observed that "the defendant retains the right to cross-examine the law enforcement officer who administered the Intoxilyzer test, and to attempt to raise doubts in the mind of the factfinder whether the test was properly administered." *California* v. *Trombetta*, 467 U.S. 479, 490 (1984).

This Court's instincts have been correct. Because state crime laboratory reports "bear[] testimony," App. 5a, they cannot – over a defendant's objection – act as a substitute for presenting the live testimony of a forensic examiner at trial. The North Dakota Supreme Court erred in holding otherwise.

1. A defendant's ability to subpoena a forensic examiner (or any other prosecution witness) as part of his defense is not enough to satisfy the Confrontation Clause. The Clause

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[7] This Court in *Diaz* was discussing the Philippine Constitution's counterpart to the Confrontation Clause, but the Court proceeded on the basis that the two provisions confer the same protection. 223 U.S. at 450-51.

guarantees a defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. This language implies that it is the prosecution's responsibility to arrange the confrontation, not the defendant's.

This Court's precedent comports with this textual understanding. In *Taylor* v. *Illinois*, 484 U.S. 400 (1988), this Court explained that the right to confrontation, like most other Sixth Amendment rights, "arise[s] automatically on the initiation of the adversary process and no action by the defendant is necessary to make [it] active in his or her case." *Id.* at 410. More specifically, the right to confrontation is "designed to restrain the prosecution *by regulating the procedures by which it presents its case against the accused.* [It applies] in every case, whether or not the defendant seeks to rebut the case against him or to present a case of his own." *Id.* at 410 n.14 (emphasis added) (quotation omitted). This means that a defendant who invokes his right to confrontation does not "waive" it by failing to subpoena the witness at issue; once a defendant objects to the prosecution's introduction of testimonial hearsay of an available witness, the prosecution must call the witness to the stand or forego introducing the out-of-court statement.

Indeed, the North Dakota Supreme Court's conception of the Confrontation Clause would render it an entirely superfluous constitutional right. The Sixth Amendment's Compulsory Process Clause – which guarantees defendants the right "to have compulsory process for obtaining witnesses in [their] favor," U.S. Const. amend. VI – already gives defendants the right to "compel a witness' presence in the courtroom" for a live examination. *Taylor*, 484 U.S. at 409. The North Dakota Supreme Court's decision thus effectively holds that the Confrontation Clause affords a defendant nothing that the Compulsory Process Clause does not already give him. This result contravenes the "first principle of constitutional interpretation," which is that "every word must have its due force, and appropriate

meaning." *Wright* v. *United States*, 302 U.S. 583, 588 (1938) (quotation omitted). "[N]o word" in the Constitution "was unnecessarily used, or needlessly added." *Ibid.*

This is especially true with respect to the "bedrock procedural guarantee," *Crawford*, 541 U.S. at 42, that the Confrontation Clause secures. Allowing the prosecution to present its case through extrajudicial declarations – subject only to defendants' subpoena power – deprives defendants of the ancient right to stand "face-to-face" with adverse witnesses as the witnesses convey incriminating evidence on direct examination. "A witness may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts." *Coy* v. *Iowa*, 487 U.S. 1012, 1019 (1988) (internal quotation omitted). In addition, requiring defendants to subpoena the prosecution's witnesses subverts defendants' ability to challenge the prosecution's case. Instead of having the right to undertake cross-examination with little risk of worsening the evidentiary record or alienating the jury, defendants are forced to gamble that calling the witness to the stand will generate such powerful impeachment evidence that the jury will understand why the defense wanted to present the witness' testimony. *See Lowery*, 996 F.2d at 772; *Rohrich*, 939 P.2d at 700-01. Even if a defendant is permitted to call a prosecution witness to the stand as a hostile witness, this "is no substitute for cross-examining that declarant *as a state's witness*." *Fisher*, 563 P.2d at 1017 (emphasis added); Richard D. Friedman, *Shifting the Burden*, http://confrontationright.blogspot.com/2005/03/shifting-burden.html (Mar. 16, 2005). "The chief merit of cross examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot." *State* v. *Saporen*, 285 N.W. 898, 901 (Minn. 1939).

Lest there be any remaining doubt, the North Dakota Supreme Court's waiver-unless-subpoena rule leads to patently unacceptable results. As the Illinois Supreme Court has recognized, this rule, taken to its logical conclusion, "necessarily mean[s] that there would be no constitutional problem with allowing the State to introduce all of its evidence by affidavit as long as the defendant is allowed to bring the prosecution's witnesses into court himself." *McClanahan*, 729 N.E.2d at 477. Indeed, a recent decision from the Georgia Court of Appeals appears to sanction just that result. *See Starr* v. *State*, 604 S.E.2d 297, 299 (Ga. Ct. App. 2004). There, the court allowed the prosecution to introduce an alleged victim's videotaped interview in lieu of her live testimony because she was available in the courthouse during trial and the *defendant* never called her to the stand. *Ibid.*

It is difficult to conceive of a scenario more offensive to the Confrontation Clause. "The primary object" of the Clause is "to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination . . . of the witness . . . ." *Mattox* v. *United States*, 156 U.S. 237, 242 (1895); *accord Crawford*, 541 U.S. at 50; *California* v. *Green*, 399 U.S. 149, 157 (1970). No conception of the Confrontation Clause that permits – indeed, invites – prosecution-by-*ex-parte*-interview can be correct.

2. A laboratory report, prepared by a state forensic examiner to further a criminal investigation, constitutes quintessentially testimonial evidence. In *Crawford*, this Court observed that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." 541 U.S. at 50; *see also Mattox*, 156 U.S. at 242 (clause intended to prohibit "ex parte affidavits" in place of live testimony). "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential

for prosecutorial abuse – a fact borne out time and again throughout a history with which the Framers were keenly familiar." *Crawford*, 541 U.S. at 56 n.7.

It takes little effort to see that state forensic examiners' crime laboratory reports fall squarely within this class. Forensic examiners create such laboratory reports at the behest of law enforcement "for use at a later trial or legal proceeding." *Walsh*, 124 P.3d at 208. Such reports are "solemn declaration[s]." App. 4a (quoting *Crawford*, 541 U.S. at 51). And such reports are forthrightly offered "in lieu of [the examiners'] live testimony." *Walsh*, 124 P.3d at 208; *see also* App. 6a (reports offered as a "substitute for the appearance of a witness").

Neither of the rationales that courts have invoked to characterize forensic examiners' laboratory reports as nontestimonial evidence provides any reason to retreat from this conclusion. Courts' reliance on the supposedly "inherently trustworthy and reliable [nature of] scientific testing," *Pruitt*, ___ So. 2d ___, 2006 WL 1793732, at *5, is nothing more than *Roberts redux*. Even assuming for the moment that these courts' assessment of the reliability of forensic testing is correct, this Court expressly rejected such legal reasoning in *Crawford*: "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." 541 U.S. at 62. Trial courts must require testimony to be presented through the adversarial process, regardless of whether they surmise that cross-examination will likely bear fruit. *Ibid.*

Nor does *Crawford*'s reference to business records support deeming forensic reports nontestimonial. The common law "shop book rule" exception for regularly kept business records, to which *Crawford* adverted, *see* 541 U.S. at 56, did not remotely encompass reports generated for prosecutorial use. *See Palmer* v. *Hoffman*, 318 U.S. 109, 113-14 (1943) (explaining that records "calculated for use

essentially in the court" or whose "primary utility is in litigating" fall outside of common law rule, and declining to expand federal exception to allow their admission); *Miller*, ___ P.3d at ___, 2006 WL 2820978, at *7-8 (tracing history of business records exception and concluding that state crime laboratory reports fall far outside historical exception). Even as recently as the 1970's, the drafters of the Federal Rules of Evidence declined to expand the "public records" exception in criminal cases to include "matters observed by police officers and other law enforcement personnel" and "factual findings resulting from an investigation." Fed. R. Evid. 803(8). They took this action "in view of the almost certain collision with confrontation rights which would result from [such records'] use against the accused in a criminal case." Advisory Committee's Notes, Note to Paragraph (8) of Rule 803, 56 F.R.D. 313 (1972). *See generally Oates*, 560 F.2d at 68-73.

It makes no difference that some jurisdictions have since decided to expand their definitions of business records and public records to include state crime laboratory reports. As this Court emphasized in *Crawford*, the reasons for subjecting testimonial statements to confrontation procedures "do[] not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances." 541 U.S. at 56 n.7. Jurisdictions may no more insulate state crime laboratory reports from confrontation scrutiny by labeling them business records as they could by giving the same label to transcripts of custodial interrogations, which, after all, police conduct in their ordinary course of business.

III. The Question Presented Significantly Impacts the Administration of Criminal Justice.

For at least three reasons, the question presented is the kind of critical constitutional issue that warrants this Court's review.

1. Crime laboratory analyses play a central evidentiary role in a large number of criminal trials. Prosecutions that lack direct evidence of the perpetrator depend heavily on scientific evaluations of circumstantial evidence. Forensic analyses, of course, also are at the center of many drug prosecutions, such as the one here. And given the onward march of technology, criminal prosecutions in the future promise to rely, if anything, even more on scientific analysis. The new practice of prosecutorial DNA testing is only a glimpse of what is likely to come.

2. The question presented implicates practices across the country. Forty-four states and the District of Columbia have hearsay exceptions permitting courts to admit forensic examiners' certified reports to establish the identity of controlled substances. Metzger, 59 Vand. L. Rev. at 478 & n.10. Numerous states also allow the admission of forensic certificates as hearsay evidence to proffer "the results of DNA tests, microscopic hair analyses, fingerprint identifications, coroners' reports, ballistics tests, and a wide range of other tests conducted by a crime laboratory." *Id.* at 479 (collecting citations).

While several states within this group – including Texas, Ohio, and Oregon – have long required prosecutors, upon objections from defendants, to present live testimony from the state forensic examiners who prepare such reports,[8]

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[8] Twelve states have statutes providing that defendants need only request their live testimony for prosecutors to have to put them on the stand at trial. *See* Metzger, 59 Vand. L. Rev. at 481-82 & n.23. Still other states have construed statutes appearing to impose greater burdens on defendants as requiring nothing more than an invocation of the right to

several other states have burden-shifting statutes like North Dakota's, which put the onus on defendants to decide whether to subpoena forensic examiners as part of their defense. *See, e.g.*, Ark. Code Ann. § 12-12-313 (2006); D.C. Code § 48-905.06 (2006); Idaho Code Ann. § 37-2745(d) (2006); R.I. Gen. Laws § 9-19-43 (2006). Numerous other states, as well as some federal decisions interpreting the federal business-records exception, also make forensic laboratory reports admissible for the truth of the matters asserted without providing any procedural device for defendants to request that prosecutors put the examiners on the stand. *See, e.g.*, Mass. Gen. Laws ch. 111, § 13 (2006); Va. Code § 19.2-187 (2006); *United States* v. *Baker*, 855 F.2d 1353, 1359 (CA8 1988) ("When made on a routine basis, laboratory analyses of controlled substances are admissible as business records under Federal Rule of Evidence 803(6)."). Because the Compulsory Process Clause grants all defendants the same subpoena power that North Dakota and other states have formally codified, *see Taylor*, 484 U.S. at 409, these jurisdictions also could apply the North Dakota Supreme Court's analysis to hold that defendants must either call forensic examiners to the stand – at least to the extent the examiners are available – or "waive" their right to confrontation.

3. The unchecked use of state crime laboratory reports in place of live testimony undermines the integrity of the criminal justice system. Recent reports have shown that "tainted or fraudulent science" contributes to a large proportion – perhaps one-third – of wrongful convictions. *See* Barry Scheck et al., Actual Innocence: Five Days to Execution, and Other Dispatches from the Wrongly Convicted 246 (2000); *see also* Metzger, 59 Vand. L. Rev. at 491-500 (detailing numerous examples).

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confrontation for the prosecutor present live testimony. *See, e.g.*, *Miller*, ___ P.3d at ___, 2006 WL 2820978, at *9.

These errors derive from several factors. First, many prosecutorial crime laboratories use undependable protocols. One study revealed that 30% of state forensic examiners asked to test a substance for the presence of cocaine rendered incorrect results. *See* U.S. Dep't of Justice, Project Advisory Committee, *Laboratory Proficiency Testing Program, Supplementary Report – Samples 6-10*, at 3 (1976). Even the FBI's most sophisticated laboratories have been plagued by startling error rates. *See* Paul C. Giannelli, Ake v. Oklahoma: *The Right to Expert Assistance in a Post*-Daubert, *Post-DNA World*, 89 Cornell L. Rev. 1305, 1320 (2004) (describing a 1997 report by the Department of Justice Inspector General). Second, a substantial number of crime laboratories are not even required to follow any standardized procedures. "[O]f the 400-500 laboratories conducting forensic examinations for criminal trials, only 283 are accredited." Metzger, 59 Vand. L. Rev. at 494. Finally, many forensic examiners, as employees in state attorney general and district attorneys offices, are prone to prosecutorial bias. This bias can subconsciously influence examiners' conclusions or cause them outright to manipulate evidence. Recent scandals in Baltimore, Phoenix, and Houston, for example, have revealed rampant falsification of evidence in those cities' crime laboratories. *See id.* at 495 & n.83.

These realities demand that state forensic examiners' evidentiary certifications be subject to the ordinary processes of direct and cross-examination. If state forensic examiners understand that they may have to present and defend their work in front of judges and juries at public trials, they are more likely to be careful and conscientious. And when examiners do make mistakes or commit malfeasance, our judicial system's traditional adversarial process is more likely than a system of trial-by-affidavit to uncover the truth. There is no doubt our Framers understood this, and the time has come to reaffirm this time-tested principle.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 2006

APPENDIX

APPENDIX A

Filed 7/27/06 by Clerk of Supreme Court

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2006 ND 168

State of North Dakota, Plaintiff and Appellee

v.

Billie Jo Campbell, Defendant and Appellant

No. 20050326

State of North Dakota, Plaintiff and Appellee

v.

Thomas David Pinks, Defendant and Appellant

Nos. 20050337 & 20050338

Appeals from the District Court of McLean County,
South Central Judicial District,
the Honorable Thomas J. Schneider, Judge.

Kapsner, Justice.

[¶1] In these consolidated cases, Thomas Pinks appeals from a judgment of conviction for being in actual physical control of an automobile while under the influence of alcohol or other drugs and possession of marijuana paraphernalia, and Billie Campbell appeals from a judgment of conviction for possession of marijuana and marijuana paraphernalia. Both claim the admission of a state crime laboratory report violated their Sixth Amendment right to confrontation because the report was a testimonial statement under the holding of *Crawford v. Washington*, 541 U.S. 36 (2004). Since the resolution of this case makes it unnecessary to decide whether the report is a testimonial statement, we determine the prudent course is not to decide an unnecessary question. Because Pinks and Campbell failed to avail themselves of their opportunity to subpoena the author of the state crime laboratory report, they have waived any potential Confrontation Clause violation. We affirm the trial court's judgments entered on jury verdicts.

I

[¶2] In mid-January 2005, Pinks and Campbell were confronted about being drug users by a barkeep at the Lewis and Clark Saloon in Washburn. A heated dispute ensued. There was testimony that bar glasses were thrown and a chair was broken over the bar. The proprietor of the saloon called the police. Pinks and Campbell left the scene in a Blazer with its rear window frosted over. The police followed and stopped the Blazer but were unable to confirm who was driving the vehicle because of the frosted windows. When the police officers reached the vehicle, they noticed Pinks was in the front passenger seat and Campbell was in the rear seat. The officer asked who had been the driver. Both stated the driver had run away before the officer arrived. The officer stated that was impossible because there was no tracks in the snow and he did not notice anyone leave the vehicle during his pursuit. Pinks explained the driver jumped out while the vehicle was moving and he had to reach over,

hit the brakes, put the vehicle in park, and shut off the engine.

[¶3] During the stop, one of the officers noticed a pipe in the front part of the vehicle, a pipe of the type the officer knew was typically used to smoke marijuana. The officer determined Pinks must have thrown it there. Pinks and Campbell were arrested and transported to the police station in separate cars. During a search of the backseat of the patrol car that transported Campbell, officers found a bag they believed contained marijuana residue. Other residue believed to be marijuana was found in one of Campbell's coat pockets. Pinks was charged with being in actual physical control of an automobile while under the influence of alcohol, criminal mischief, and possession of marijuana paraphernalia. Campbell was charged with possession of marijuana and marijuana paraphernalia.

[¶4] At trial, the State relied on a certified report from the state crime laboratory. The report stated the evidence seized from Pinks and Campbell was marijuana. Both Pinks and Campbell objected to the introduction of the report into evidence arguing the report violated their constitutional right to confrontation because the forensic scientist who authored the report did not testify. Neither party subpoenaed the author of the report.

[¶5] After receiving the report into evidence, a jury convicted Campbell of all charges. Pinks was found guilty for possession of drug paraphernalia and being in actual physical control of a motor vehicle while under the influence of intoxicating liquor or other drugs, and acquitted of the criminal mischief charge. On appeal, both Pinks and Campbell raise the single issue of whether the district court erred in admitting the state crime laboratory report in violation of their constitutional right to confront their accusers.

II

[¶6] The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to

be confronted with the witnesses against him." U.S. Const. amend. VI. Our standard of review for a claimed violation of a constitutional right, including the right to confront an accuser, is de novo. *State v. Blue*, 2006 ND 134, ¶ 6. As we recognized in *Blue*, the United States Supreme Court has redefined the federal right to confrontation. *Id.* at ¶ 7. In *Crawford v. Washington*, 541 U.S. 36, 59 (2004), the Supreme Court held the admission of out-of-court testimonial statements in criminal cases is precluded, unless, when the witness is unavailable to testify, the accused has had a prior opportunity to cross-examine the declarant. Without adopting a precise definition for what constitutes a testimonial statement, the court recognized that testimony means a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51 (citing definition of testimony from 1 N. Webster, *An American Dictionary of the English Language* (1828)).

[¶7] In *Blue*, 2006 ND 134, ¶ 9, we noted the *Crawford* court's various formulations defining testimonial statements. Testimonial statements could refer to three classes of statements:

> ex parte in-court testimony or its functional equivalent, which includes such things as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially. . . . out-of-court statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions. . . . The final class described by the Supreme Court is comprised of testimonial statements made under circumstances which would lead an objective witness reasonably to believe that the

> statement would be available for use at a later trial.

Id. (citations and quotation marks omitted).

[¶8] We also recognized that *Davis v. Washington*, 126 S. Ct. 2266 (2006) gave further guidance regarding the distinction between testimonial and nontestimonial statements.

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Blue, at ¶ 11 (citing *Davis*, 126 S. Ct. at 2273-74). We stated that whether an individual was acting as a witness and in essence "testifying" should be determined by looking to the surrounding circumstances of when a report is made, the nature of the report given, the level of formality when making a report, and the purpose of the report. *Id.* (citing *Davis*, 126 S. Ct. at 2276-77).

[¶9] In this case, the forensic scientist's report bears testimony in the sense that it is a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51 (citing definition of testimony from 1 N. Webster, *An American Dictionary of the English Language* (1828)). The report was signed by a state forensic scientist in his official capacity, written on letterhead from the attorney general's office, crime laboratory division, and created for purposes of providing evidence under N.D.C.C. § 19-03.1-37(4). The report was created for the purpose of establishing the content of the residue found in the pipe, bag, and Campbell's coat pocket, and was the primary

evidence offered to establish the seized property contained marijuana. This procedure is authorized by statute.

[¶10] Section 19-03.1-37(4), N.D.C.C., provides:

> In all prosecutions under this chapter, chapter 19-03.2, or chapter 19-03.4 involving the analysis of a substance or sample thereof, a certified copy of the analytical report signed by the director of the state crime laboratory or the director's designee must be accepted as prima facie evidence of the results of the analytical findings.

This statute acts as a substitute for the appearance of a witness who would testify: "I am the director of the state crime laboratory or the director's designee. This substance was analyzed and it was determined to be marijuana."

[¶11] The certified report certainly has indicia of a testimonial statement in light of *Crawford* and *Davis*. To date, courts are split as to whether a lab report such as the one at issue here is testimonial.[1] However, because of our

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[1] *See State v. March*, No. 27102, 2006 Mo. App. LEXIS 998, *12 n.4 (Mo. Ct. App. June 30, 2006) (compiling a list of jurisdictions addressing whether a lab report is testimonial). *See, e.g., United States v. Rahamin*, 168 Fed. Appx. 512, 520 (3d Cir. 2006) (recognizing that a DEA laboratory report appeared to be a testimonial statement since it was offered to prove the weight and substance of ecstasy pills, but declining to decide the issue); *Belvin v. State*, 922 So. 2d 1046, 1054 (Fla. Dist. Ct. App. 2006) (breath test affidavit attesting to technician's procedures and observations was testimonial and inadmissible under *Crawford*); *Johnson v. State*, 929 So. 2d 4, 6 (Fla. Dist. Ct. App. 2005) ("lab report prepared pursuant to police investigation and admitted to establish an element of a crime is testimonial hearsay even if it is admitted as a business record"); *Shiver v. State*, 900 So. 2d 615, 618 (Fla. Dist. Ct. App. 2005) (affidavit prepared prosecutorially in preparation for trial attesting to proper maintenance on breath test machine was testimonial); *People v. Lonsby*, 707 N.W.2d 610, 620-21 (Mich. Ct. App. 2005) (information from lab report intimating that substance on defendant's shorts was semen was testimonial and inadmissible under *Crawford*); *City of Las Vegas v. Walsh*, 124 P.3d 203, 207-08 (Nev. 2005) (affidavit attesting that proper method of blood testing was followed was testimonial as it was prepared

for litigation); *State v. Berezansky*, 899 A.2d 306 (N.J. Super. Ct. App. Div. 2006) (laboratory certificate indicating sample of defendant's blood contained a blood-alcohol level of .33% was a testimonial statement because the report was not a record prepared or maintained in the ordinary course of government business, but was prepared in order to prove an element of the crime and offered in lieu of producing the qualified individual who actually performed the test); *People v. Rogers*, 8 A.D.3d 888, 891 (N.Y. App. Div. 2004) (report verifying presence of alcohol in victim's blood was prepared for prosecution and thus testimonial); *State v. Smith*, 2006 Ohio 1661, ¶¶ 5, 18 (Ohio Ct. App. 2006) (a laboratory report of a chemical analysis performed on substance determined to be crack cocaine was a testimonial statement, but defendant waived his confrontation rights by failing to demand the testimony of the laboratory technicians under state statute); *Commonwealth v. Carter*, 861 A.2d 957, 969-70 (Pa. Super. Ct. 2004) (without benefit of *Crawford*, court held that a lab report verifying the presence of cocaine in items seized from defendant was prepared in preparation for litigation and therefore lacked indicia of reliability traditionally found in business records). *But see Pruitt v. Alabama*, CR-04-2495, 2006 Ala. Crim. App. LEXIS 121, *13 (Ala. Crim. App. June 30, 2006) (certificate of analysis nontestimonial in nature and admissible under business-record hearsay exception); *People v. Johnson*, 18 Cal. Rptr. 3d 230, 233 (Cal. Ct. App. 2004) (laboratory report of substance determined to be cocaine used at probation revocation hearing "does not 'bear testimony,' or function as the equivalent of in-court testimony"); *People v. Hinojos-Mendoza*, No. 03CA0645, 2005 Colo. App. LEXIS 1206, *10 (Colo. Ct. App. July 28, 2005) (laboratory report establishing quantity and nature of cocaine was not testimonial due in part because the report was not prepared at the express direction of the prosecutor for the purpose of litigation); *Commonwealth v. Verde*, 827 N.E.2d 701, 705 (Mass. 2005) (certificates of analysis showing weight of cocaine not considered testimonial statements, as public records they constituted a recognized exception to Confrontation Clause); *State v. Dedman*, 102 P.3d 628, 635-36 (N.M. 2004) (the unavailability of a nurse that drew blood from defendant did not render report documenting results as inadmissible because it was considered nontestimonial as the testing was generated by a Department of Health employee, not law enforcement, and the report was not investigative or prosecutorial); *State v. Forte*, 629 S.E.2d 137, 143 (N.C. 2006) (DNA results that were not prepared exclusively for trial were nontestimonial since "[t]hey do not fall into any of the categories that the Supreme Court defined as unquestionably testimonial"); *State v. Huu The Cao*, 626 S.E.2d 301, 305 (N.C. Ct. App. 2006) (holding "laboratory reports or notes of a laboratory technician

resolution of this case, we need not decide that question today because, even assuming the report is testimonial, no Sixth Amendment violation can exist where a defendant voluntarily does not avail himself of the opportunity to confront a witness. *City of Las Vegas v. Walsh*, 124 P.3d 203, 209 (Nev. 2005).

[¶12] Section 19-03.1-37(5), N.D.C.C., provides certain procedural safeguards to protect an accused's confrontational rights:

> Notwithstanding any statute or rule to the contrary, a defendant who has been found to be indigent by the court in the criminal proceeding at issue may subpoena the director or an employee of the state crime laboratory to testify at the preliminary hearing and trial of the issue at no cost to the defendant. If the director or an employee of the state crime laboratory is subpoenaed to testify by a defendant who is not indigent and the defendant does not call the witness to establish relevant evidence, the court shall order the defendant to pay costs to the witness as provided in section 31-01-16.

Under this statute, defendants may subpoena the report's author. The statute also authorizes an indigent defendant to subpoena the director or employee of the state crime laboratory to testify at the preliminary hearing and trial at no cost to the defendant, making that witness available for confrontation.

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prepared for use in a criminal prosecution are nontestimonial business records only when the testing is mechanical, as with the Breathalyzer test, and the information contained in the documents are objective facts not involving opinions or conclusions drawn by the analyst"); *In re J.R.L.G.*, No. 11-05-00002-CV, 2006 Tex. App. LEXIS 3344, *6 (Tex. App. April 27, 2006) (urinalysis lab report from screening done under drug screen compliance check was nontestimonial evidence).

[¶13] There is nothing in this record to suggest the forensic scientist was unavailable. The statute provided Pinks and Campbell with the opportunity to subpoena the forensic scientist. They did not avail themselves of that opportunity. There may have been strategic reasons for not doing so. As a matter of trial tactics, subpoenaing the scientist, unless there are very sound reasons for challenging the report's accuracy, could elevate the importance of the report to the fact-finder. It is the opportunity to confront that is constitutionally required. This right can be waived. *City of Las Vegas v. Walsh*, 124 P.3d 203, 208 (Nev. 2005) (recognizing Confrontation Clause objections may be waived by failure to comply with statutory procedures). Because neither Pinks nor Campbell attempted to subpoena the forensic scientist as provided by statute, they have waived their ability to complain of a constitutional violation.

III

[¶14] Because the statute provided the author of the report would be made available by subpoena and Pinks and Campbell failed to avail themselves of that opportunity to confront the witness, they have waived any potential Confrontation Clause violation. We affirm.

[¶15] Carol Ronning Kapsner
Mary Muehlen Maring
Daniel J. Crothers
Dale V. Sandstrom
Gerald W. VandeWalle, C.J.

APPENDIX B

State of North Dakota
County of Mclean

In District Court
South Central Judicial District

Criminal Nos. 05-K-41 & 05-K-29,
05-K-30

State of North Dakota,	)	
	)	
Plaintiff,	)	
	)	
Vs.	)	Jury Trial
	)	
Billie Joe Campbell and	)	
Thomas Pinks, III,	)	
	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS

Before the Honorable Thomas J. Schneider
-- District Judge --

Taken At:
McLean County Courthouse
Washburn, North Dakota
June 13, 2005

APPEARANCES

For The Plaintiff:	Mr. Ladd Erickson State's Attorney Box 1108 Washburn, North Dakota 58577
For The Defendant: (Campbell)	Mr. Kent Morrow Attorney at Law P.O. Box 2155 Bismarck, North Dakota 58502-2155
For The Defendant: (Pinks)	Mr. Michael Hoffman Attorney at Law P.O. Box 1056 Bismarck, North Dakota 58502-1056

Q. [Page 112, Line 10][Mr. Erickson:] Now, items one through three there, what did you do with those?

A. I took them down to the state crime lab in Bismarck to have them tested.

Q. Did you get a lab report back?

A. Yes, I did.

Q. Officer, I will hand you what has been marked as State's Exhibit Number 4. Can you identify this?

A. Yes, I can.

Q. What is that?

A. This would be the laboratory report from the state lab in Bismarck.

Q. And that is for this case?

A. Yes.

MR. ERICKSON: Your Honor, I would move to admit -- well, excuse me. [113]

Q. (Mr. Erickson continuing) Is this a certified copy?

A. Yes, this is from the state lab.

Q. Okay.

MR. ERICKSON: Your Honor, I would move to admit State's Exhibit Number 4.

MR. HOFFMAN: Judge, I am going to object on the fact that the contents of that report are testimonial under *Crawford versus Washington*. We have a right to confront any lab person who purports to give information in this case.

MR. MORROW: I will join in that objection.

THE COURT: Mr. Erickson?

MR. ERICKSON: Your Honor, *Crawford* does not deal with -- it dealt with a non-staturized or coded hearsay exception. It was a common law case, hearsay rule that was otherwise reliable.

In this particular case in North Dakota, we have a specific statutory provision that permits the admissibility of a certified copy of a drug lab report, so there is a staturized hearsay exception to it and therefore it is

admissible under North Dakota law and a case called *State versus Schneider*.

THE COURT: Mr. Hoffman?

MR. HOFFMAN: If I'm correct, *Crawford versus* [114] *Washington* dealt with the admissibility of the subject evidence. In that case -- and it was admitted under their evidence rules. Now, whether we're talking about evidence rules or statute, it's the same thing. If there is a violation of confrontation, then it doesn't matter if there is a rule or if there is a statute, we still have the 6th amendment right to the evidence, witnesses and evidence against us. The question is whether it is testimonial. It is obviously testimonial, and the lab technician is not here. Doesn't matter if there's a statute, we have a right to examine the witness.

THE COURT: Want to add anything else, Mr. Erickson?

MR. ERICKSON: I don't obviously agree, Your Honor. I've got a lot of *Crawford* cases. The testimonial nature of this is put into the century code, and that -- where I disagree with the interpretation of that case is this; there was no rule in *Crawford*, there was a murder case where there was an after-statement made by the wife who didn't testify because of spousal immunity at trial, and her statement was admitted through a third party and it was dealing with that area. It has nothing to do with these documented foundation exhibits and certifications. [115]

THE COURT: All right. Mr. Erickson, Mr. Morrow, Mr. Hoffman, why don't you step up for just a moment here.

(Bench conference had, but not reported)

THE COURT: Okay. Members of the jury, we're going to take a short recess. I need to meet with the attorneys briefly. So keep in mind the admonition instruction. You are not to discuss the case or let anybody discuss it with you and do not form or express an opinion until the case is concluded and submitted to you for your deliberation. We'll take a short recess now.

(Recess had)
(In Chambers discussion had)

THE COURT: We're on the record now concerning an objection to the admission of State's Exhibit Number 4. Mr. Hoffman, from what I understand, you are saying that the Exhibit 4 would not be admissible because it is testimonial and the U.S. Supreme Court stated that this type of testimony, you have the right to cross-examine the analyst, is that correct?

MR. HOFFMAN: *Crawford versus Washington* did not deal with the lab report, it dealt with the police interrogation of a spouse against the other spouse out [116] of court, and she did not testify at the trial claiming privilege. The lower courts allowed the statements into evidence against the defendant. U.S. Supreme Court held that it was clearly testimonial because it was police interrogation and because it was testimonial, there should have been a right to cross-examine in the trial court and since that didn't happen, there was a reversal. They did not talk about lab reports.

City of Las Vegas versus Walsh, I believe it is, was a DUI case in which there was an objection by the defense to the fact that the nurse's blood draw was allowed into evidence without cross-examination of the nurse. The Supreme Court of Nevada overturned it and said, yes, you have a right to cross examine the nurse. We have a similar statute in North Dakota that allows -- the statute specifically allows use or still does allow the nurse's information to come in without bringing the nurse to testify.

THE COURT: And the lab tests?

MR. HOFFMAN: Well, it doesn't -- well, yes, we have. That's right. And as far as -- there is a blood draw for DUI, a blood draw for that, and granted a statute that allows the prosecution to use these lab reports without bringing the lab people. It would be the same thing as allowing the nurse's information [117] without bringing the nurse. My point is that it doesn't matter whether a rule of

evidence would allow something or a statute would allow something, if under *Crawford versus Washington* it is testimonial and you cannot cross-examine it. A 6th amendment violation.

So any DUI rule allowing the blood test in without the nurse or in this case a lab without the analyst, is still in violation of confrontation. *Crawford versus Washington* changed things. I believe the DUI context, that issue is before the North Dakota Supreme Court. And I believe Mr. Tuntland argued that case, but I don't know who the prosecutor was. It is an issue before the North Dakota Supreme Court now, but for the purposes of this trial under *Crawford* analysis, that is testimonial and we should be able to confront and cross-examine that analyst.

THE COURT: Mr. Erickson?

MR. ERICKSON: Your Honor, here's the way I understand *Crawford*, and I believe that under that Las Vegas case this is admissible. Let me talk about that first. What happened in the Las Vegas case, which was the first state court case that came out of *Crawford* -- there is one in Indiana now that admitted and I have that case in my office. I don't know how much relevance all this is. What happens in that case is the state [118] statute in Nevada had listed a number of things that the nurse could attest to, and drawing blood. And one of the things not in the statute was using an alternative disinfectant swab, so the nurse writes on the document the alternative disinfectant was used for the draw and no statutory hearsay exception for that. That wasn't in part of their statute.

So what happened in *Walsh* is that the Supreme Court of Nevada said that was a violation of *Crawford*, because not recognized hearsay exception. Here's where I differ with Mr. Hoffman, my understanding of *Crawford* is this; a case called *Ohio versus Roberts*, prior to *Crawford*, and what that did is there was evidence like in *Crwaford* that was beyond any generally recognized general

exception and testimonial in nature being it was allowed there if the court was satisfied it was otherwise reliable.

Now, the statement in court was a recorded statement to a spouse. That does not fall in hearsay exception. Once she claims spousal immunity or spouse claims that, and admitted over that objection, it didn't fit in anywhere, so I believe the burden is two-fold here. One, if it is testimonial, these documented, then the question for the court is does it fall within a generally recognized or modified hearsay exception? [119] That's the test of the *Crawford* case is.

In this case, as in *Walsh* and the other ones, the documents do have a legal basis for admissibility. Hearsay exceptions were not overruled. But one reason they're in the code, and this is one of them, there's no violation of *Crawford* when it comes to drug lab reports. It is a little different, by the way, in DUI cases, because a few things generalized on those may not be argued -- could be argued and don't get backed up by the Century Code. In this case I don't believe any *Crawford* order violations.

THE COURT: Mr. Morrow, anything else?

MR. MORROW: No.

THE COURT: We have had it all on the record, and the exhibit will be received. I don't think it is a violation, so the exhibit will be received. Anything else?

MR. HOFFMAN: No.

MR. MORROW: No.

THE COURT: Mr. Erickson?

MR. ERICKSON: No.

THE COURT: We'll go back in then and then we'll start up again.

(In-chambers discussion concluded)

THE COURT: We're back on the record now. [120] Mr. Erickson?

MR. ERICKSON: Your Honor, I move to admit State's Exhibit Number 4, subject to previous objections.

THE COURT: Okay. Four is received.

Q. (Mr. Erickson continuing) Deputy, would you tell the jury, based on Exhibits 1, 2, and 3, what the lab results were so they can understand what they're looking at?

A. Yes, I can. Item number one here would have been the baggie that was found in the rear seat of the patrol car. It shows item number one, a plant material residue and substance found in this item would have been Cannibis [sic], like meaning marijuana.

Item two, the one-hitter pipe. Again, smoking device that shows a substance found, resine [sic] of Cannibis [sic], being marijuana.

And the third item, the plant material residue that was found in the coat pocket, showed substance found Cannibis [sic], being marijuana.

Q. Thank you.

MR. ERICKSON: Can I have a moment, Your Honor?

THE COURT: Yes.

MR. ERICKSON: No further questions.

APPENDIX C

STATE'S EXHIBIT 4

STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL

Crime Laboratory Division
2635 E. Main Ave. – Box 937
Bismark, North Dakota 58502
Phone (701) 328-6159

RECEIVED
FEB 02 2005
McLean County
States Attorney

LABORATORY REPORT

Laboratory No.: C05-0114 Date Received: 24 Jan. 05
Received By: Troy Goetz Time Received: 1525 Hrs.
Delivered By: Jerry Kerzmann Date Reported: 25 Jan. 05
Agency Case No.: ----
Report To: McLean County Sheriff's Office
Washburn, ND 58577
Subject: Thomas Pinks
Billie Jo Campbell

Description of Evidence Submitted:

Item 1: One closed plastic zip lock evidence bag marked "baggy with possible marijuana residue, in back seat of patrol car, 1-15-04 approx. 0150, Billie Campbell, possession of a controlled substance, Deputy Jerry Kerzmann" containing one empty plastic bag and one cellophane wrapper containing plant material residue.

Item 2: One closed plastic zip lock evidence bag marked "one hitter pipe, in front of Chevy Blazer right under bumper, 1-15-04 approx. 0130, Thomas D Pinks, possession of drug paraphernalia, Deputy Jerry Kerzmann" containing one smoking device.

Item 3: One closed plastic zip lock evidence bag marked "possible marijuana seeds and residue, Billie Campbells person front left coat pocket, 1-15-05 approx. 0200, Billie Campbell, possession of

controlled substance, Correction officer Noelle Kroh" containing plant material residue.

Summary of Analysis:

Item	Submitted	Substance Found
1	plant material residue	Cannabis (Marijuana)
2	smoking device	Resin of Cannabis (Marijuana)
3	plant material residue	Cannabis (Marijuana)

Sincerely,

Crime Laboratory Division

[Signature]

Troy Goetz
Forensic Scientist

(1)

No. 06-564

FILED
DEC 2 F 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

Thomas D. Pinks and Billie Jo Campbell,
Petitioners,

v.

North Dakota,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of North Dakota

RESPONDENT'S BRIEF IN OPPOSITION

Ladd R. Erickson
Counsel of Record
McLean County State's Attorney
P.O. Box 1108
Washburn, North Dakota 58577
(701) 462-8541

BHG, Inc. Garrison, N.D. 58540 Phone (701) 463-2201

QUESTION PRESENTED

Whether the North Dakota Supreme Court correctly found that petitioners waived their Confrontation Clause claim by failing to avail themselves of a state law allowing them to subpoena the witness to testify at trial, and whether the overwhelming evidence of the petitioners' guilt would make any error harmless.

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RESPONDENT'S BRIEF IN OPPOSITION

Petitioners ask the Court to resolve an issue that the North Dakota Supreme Court specifically refused to reach - whether certified laboratory reports are "testimonial" within the meaning of *Crawford* v. *Washington*, 541 U.S. 36 (2004). It is settled Supreme Court practice, however, "not to decide in the first instance issues not decided below," *National Collegiate Athletic Assn.* v. *Smith*, 525 U.S. 459, 470 (1999); accordingly this case is not a proper vehicle for answering the question presented.

What the North Dakota Supreme Court did decide is that, "*even assuming* the report is testimonial" under *Crawford,* petitioners' Confrontation Clause rights were not offended because the petitioners had a statutory right to summon the report's author to trial and declined to do so. Pet. App. at 8a. (*Emphasis added*) Petitioners attempt to turn this impediment to Supreme Court review into an added reason to grant their petition - claiming that the state court's decision implicates a split over whether parties who decline to exercise their legal right to summon laboratory report writers can still claim error under the Confrontation Clause. Pet. at 8-18. The split petitioners allege is illusory, however, and the question presented in this case is therefore inappropriate for certiorari review.

STATEMENT OF THE CASE

This case involves a ruckus at the Lewis & Clark Saloon in Washburn, North Dakota during mid-January, 2005. The saloon owner called the police as the petitioners left the scene. A deputy sheriff responded and witnessed the petitioners'

vehicle traveling in the area. The deputy followed the vehicle as it made a quick turn onto a side street, a second quick turn into an alley, and then stopped with the deputy stopping behind it.

The windows on the petitioners' vehicle were frosted over to the point that the deputy could not see inside. Upon exiting his patrol car and approaching the petitioners' vehicle, the deputy found Mr. Thomas Pinks in the front passenger seat and Ms. Billie Jo Campbell in the back seat. No one was in the driver's seat. The deputy asked Mr. Pinks who was driving the vehicle and he claimed the driver had fled. The deputy explained that he had been behind the vehicle and did not witness anyone get out and that there were no foot prints in the snow where Mr. Pinks claimed the driver had run. Mr. Pinks reiterated his claim and stated that he had to hit the brakes and put the vehicle in park when the driver jumped out.

The petitioners were separated. Mr. Pinks was placed in a backup officer's patrol car and Ms. Campbell was placed in the responding deputy's patrol car. The officers determined that both petitioners were under the influence of alcohol. During the investigation the officers found a metal "one-hitter" marijuana smoking device between the vehicles where Mr. Pinks had walked. This device was warm to the touch and free of frost despite laying on the ice and snow with an outside air temperature of ten to twenty degrees below zero. Mr. Pinks was arrested for being in Actual Physical Control of a Motor Vehicle while under the Influence of Alcohol (APC) , a Class B Misdemeanor, and Possession of Drug Paraphernalia, a Class A Misdemeanor. (Mr. Pinks was also charged with Criminal Mischief for breaking a bar glass and stool in the saloon but was acquitted on that charge.)

Ms. Campbell was taken into custody and transported to the sheriff's department to be detoxicated. When she exited

the patrol car, the deputy found a baggie of marijuana in the back seat. In addition, a search of her coat by a jailer yielded marijuana seeds and stems. Ms. Campbell was charged with Possession of Marijuana, a Class B Misdemeanor, and Possession of Drug Paraphernalia, a Class A Misdemeanor.

During the trial the contraband found in the petitioners' possession was admitted into evidence. In addition, the jury heard testimony from the arresting officer that he is trained in identifying marijuana and drug paraphernalia, and he was able to identify the items seized as contraband. In particular, he had sniffed the "one-hitter" after observing residue on it and could smell the odor of burnt marijuana.

The jury also received a copy of a certified laboratory report which reported the items found were marijuana and "Resin of Cannabis" on the smoking device. Both petitioners objected to the admission of the laboratory report on the grounds that without the testimony of the report writer it was barred by *Crawford*. The trial court heard arguments in chambers regarding the petitioners' objection and overruled them. The laboratory report was admitted into evidence. (There was no laboratory report regarding Mr. Pinks' blood alcohol level relating to his APC charge because he refused to take a chemical test.)

The jury returned guilty verdicts on the drug and APC charges. Both petitioners appealed their convictions to the North Dakota Supreme Court claiming the trial court had committed error in admitting the laboratory report without the testimony of the report writer. Bypassing the issue of whether the laboratory report was testimonial or admissible as a business or public record, the court ruled that the petitioners waived their right to complain about a Confrontation Clause violation because North Dakota law permitted them to subpoena the report writer.

REASONS FOR DENYING THE PETITION

I. Petitioners ask this Court to decide an issue that the North Dakota Supreme Court expressly declined to decide.

Petitioners assert that the Court should use this case to flesh out the meaning of "testimonial" under *Crawford*. They allege a deep split in authority "over the question of whether state crime laboratory reports are testimonial." Pet. at 14. They go on to claim the reports are "quintessentially testimonial" and that "[t]he unchecked use of state crime laboratory reports in place of live testimony undermines the integrity of the criminal justice system." *Id.* at 22, 26. While the respondent strongly disagrees with these claims, they are ultimately irrelevant to this petition.

The North Dakota Supreme Court specifically refused to decide whether the laboratory report at issue was testimonial: "Since the resolution of this case makes it unnecessary to decide whether the report is a testimonial statement, we determine the prudent course is not to decide an unnecessary question." Pet. App. at 2a, 8a.

This Court has announced repeatedly its refusal "to not decide in the first instance issues not decided below." *National Collegiate Athletic Assn.* v. *Smith*, 525 U.S. 459, 470 (1999); *see also Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) (*per curiam*)

In this case, not only did the state court not decide the question but its decision includes dicta actually favoring the petitioners' position. *See* Pet. App. at 5a. (observing that "the forensic scientist's report bears testimony in the sense that it is a 'solemn declaration or affirmation made for the purpose of

establishing or proving some fact.'") (quoting *Crawford*, 541 U.S. at 51) Indeed, petitioners have no reason to think that the very claim they would advance in this Court - that laboratory reports are "testimonial" within the meaning of *Crawford* - will not prevail in the North Dakota courts. In short, this case is not the appropriate vehicle for addressing the question the petitioners presented or for resolving the alleged split in authority to which the petitioners devote so much of their petition.

It is important to note that the context in which the Court reviewed the application of the Confrontation Clause in *Crawford* dealt with the admissibility of a prior statement from a lay witness to a crime. While not inclusively defining testimonial statements, the Court stated that the term at least included prior statements made at preliminary hearing, before grand juries, at a former trial, and during police interrogations. *Crawford* at 68.

When admittance of a certified laboratory report is the subject of Confrontation Clause analysis, some questions are distinct from lay witnesses to a crime who are clearly "witnesses against him." *See White* v. *Illinois*, 502 U.S. 346, 359 (1992)(THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment.)

If the author of a laboratory report, a nurse who drew blood from a DUI suspect, a person who does maintenance on a breath testing device, and many other examples are 'witnesses against him' under the Confrontation Clause, only then does the analysis shift to whether the laboratory report, or foundational document for that report, is testimonial under *Crawford* or admissible as a business or public record. ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States

flexibility in their development of hearsay law...." *Crawford* at 68.)

The North Dakota Supreme Court did not rule on any of these issues. Recently, the Court revisited *Crawford* and refined the term 'testimonial' based on new facts and circumstances. *See Davis* v. *Washington,* 126 S.Ct. 2266, 2273 (2006). If the Court revisits *Crawford* in this case, it would do so without the benefit of a lower court's factual analysis and legal findings.

II. This case does not implicate a split over whether parties with the power to compel the appearance of the author of a laboratory report can still claim error under the Confrontation Clause.

Petitioners contend that the actual basis for the state court's decision - the fact that petitioners declined to subpoena and confront the author of the laboratory report at trial as it was their right to do under state law - is itself reason to grant review in this case. Petitioners allege a deep split among "[s]tate courts of last resort and federal courts of appeals" on this question. Pet. at 9. However, most of the petitioners' authority predates *Crawford* which the Court decided in 2004, and is therefore inapposite[1].

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[1]Respondent does not concede that there is a substantial division between lower court pre-*Crawford* authorities and the North Dakota Supreme Court on this issue. Many of the petitions' pre- *Crawford* authorities address a range of issues either unrelated to or distinct from the question presented. For example, in *State v. Coombs*, 821 A.2d 1030 (N.H. 2003), Pet. at 12, the court addressed a statute that

Crawford changed the analytical framework for resolving Confrontation Clause claims. Whether a defendant's statutory right to "subpoena the director or an employee of the state crime laboratory to testify at a preliminary hearing or trial" without cost to the defendant under N.D. Cent. Code §19-03.1-37(5) defeats a Confrontation Clause challenge needs to be decided in light of *Crawford*. Accordingly, any pre-*Crawford* dispute over this question is now moot. Petitioners implicitly acknowledge as much when they use *Crawford* to argue that North Dakota's subpoena right is constitutionally insufficient. *See* Pet. at 21.

Petitioners two post-*Crawford* decisions from "[s]tate courts of last resort and federal courts of appeals" do not show any split in authority. Applying *Crawford*, the D.C. Circuit found no Confrontation Clause violation where defendants failed to take advantage of a law allowing them to subpoena the chemist who authorized the report. *See Howard* v. *United States*, 902 A.2d 127,135 (D.C. 2006); Pet. at 9.

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allowed a certifying scientist to testify in a blood test case in lieu of the report writer. The court held that the admission of the blood test report did not violate the defendant's rights under the Confrontation Clause." *Id.* at 1033. Petitioners cite dicta from *Coombs* for the proposition that "the defendant's ability to subpoena a forensic examiner "is beside the point" because "[t]he duty to confront a defendant with witnesses falls upon the State." *Id.* However, the context of that dicta related to another statute (not at issue in *Coombs*) that placed a burden on the defendant to file "specific grounds" for an objection to the laboratory report within ten days of trial. *Id.* at 1032. *Coombs* actually supports the North Dakota Supreme Court's decision in the present case.

The petitioners' other post-*Crawford* (state court of last resort) authority, *State* v. *Snowden*, 986 A.2d 314 (Md. 2005); *see* Pet. at 13, did not involve laboratory reports and is not in conflict with the present case. *Snowden* involved a state law allowing a sexual abuse investigator to testify to statements made to her by a child. *Id.* at 319. In relevant part, the narrow question before the Maryland court was whether the defendant waived his Sixth Amendment claim by failing to lodge a specific objection to the prosecution's failure to call the child to testify. *Id.* at 330-33. The court ruled the defendant had sufficiently objected and preserved the issue for appeal, but did not address a state law right like North Dakota's statutory right to call the author of a laboratory report writer free of costs.

In *Belvin* v. *State*, 922 So.2d 1046 (Fla.App. 4 Dist. 2006) an intermediate appellate court reviewed an affidavit from a breath test operator that was admitted at trial as a substitute for the testimony of the test operator. North Dakota has no similar statute. In addition, this case is currently under review with the Florida Supreme Court. *See State* v. *Belvin*, 928 So. 2d 336 (Fla. 2006)

The differences, in reality, between lower courts over this issue are much shallower than the petition alleges. For example, petitioners rely upon *Schaal* v. *Gammon*, 233 F.3d 1103 (CA8 2000) to allege a division on this issue between North Dakota and the Eighth Circuit Court of Appeals. Pet. at 14.

Schaal is a pre-*Crawford* child sex case. The issue under review in *Schaal* was whether the prosecution was required to call the child as a witness, or whether a taped interview of the child alone could be played for the jury. The court ruled that

the child must testify to satisfy the Confrontation Clause. *Id.* at 1106-07. In a case released just weeks prior to and cited in the present case, the North Dakota Supreme Court ruled on an identical issue in an identical way. *See State* v. *Blue*, 2006 ND 134, 717 N.W.2d 558. The Confrontation Clause issues in child sex cases are distinct from the present case.

When an "apples to apples" analysis of the cases is made, the petition fails to establish a claim that there is a percolated lower court dispute regarding a defendant's ability to subpoena a report writer in the post-*Crawford* era. Frankly, *Crawford* and *Davis* are too recent for it to be otherwise.

III. Even if the admission of the laboratory report in this case were deemed improper, there was ample additional evidence for the jury to find the petitioners guilty.

This case was not about a laboratory report during the trial. Neither petitioner made an argument to the jury that the exhibits were not marijuana or drug paraphernalia. The arresting officer was able to identify the exhibits as contraband through his training and he testified that the "one-hitter" had residue that smelled of burnt marijuana. Tr. p. 75, lines 23-25; p. 76, lines 1-8; p. 102, lines 20-25.

Petitioners used their closing argument attempting to persuade the jury that the prosecutor's burden of proof was just so incredibly high that "we cannot brand" the petitioners as criminals based on the evidence before them. Tr. 167, lines 1-5. In addition to other arguments, petitioners argued the prosecutor should have presented DNA or fingerprint evidence to prove they had possessed the exhibits. Tr. 172, lines 9-25; p. 173, lines 1-9.

The jury question in this case was whether they "possessed" the contraband. Mr. Pinks was convicted of APC without a laboratory report of his blood alcohol level, and it is hard to envision how this jury would have acquitted the petitioners without an admittance of the laboratory report at issue. In short, any error that might be found in this case would be harmless.

***

At least twice this Court has declined to hear cases that present issues and arguments similar to the petition in this case. *See City of Las Vegas* v. *Walsh*, 124 P.3d 203 (Nev. 2005) *cert. denied,* 126 S.Ct. 1786 (2006); *Napier* v. *State*, 827 N.E.2d 565 (Ind. Ct. App. 2005); *cert. denied*, 126 S.Ct.1437(2006). Certainly the Court will be presented with another case where the lower court actually ruled on the main post-*Crawford* issues involving laboratory reports and the report was germane to the verdict.

CONCLUSION

For the forgoing reasons, the petition for a writ of certiorari should be denied.

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No 06 564

IN THE
Supreme Court of the United States

Thomas D Pinks and Billie Jo Campbell
Petitioners

v

North Dakota
Respondent

On Petition for Writ of Certiorari
to the Supreme Court of North Dakota

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REPLY BRIEF FOR PETITIONERS

The North Dakota Supreme Court held, at the State's urging, that the prosecution may introduce a state forensic examiner's crime laboratory report against the accused as a substitute for the examiner's live testimony, so long as the accused is left with the ability to subpoena the forensic examiner as part of his defense. The State, however, does not attempt to defend the merits of this decision. Nor does it dispute its importance to the administration of criminal justice. Nevertheless, the State asks this Court to deny review because the conflict of authority the North Dakota Supreme Court's decision deepens is not yet fully developed and because this case supposedly has vehicle deficiencies.

None of the State's arguments withstands scrutiny. The North Dakota Supreme Court's decision squarely implicates a multi-pronged conflict that is fully entrenched and ever growing. Furthermore, this case is an ideal vehicle for resolving that conflict and for ensuring that the Confrontation Clause is no longer subverted in the manner condoned by the North Dakota Supreme Court and several others.

I. The North Dakota Supreme Court Reached and Resolved the Question Presented.

The State first claims that "Petitioners ask this Court to decide an issue that the North Dakota Supreme Court expressly declined to decide." BIO 4. This assertion, however, is patently untrue. Petitioners ask this Court to decide "[w]hether the Sixth Amendment's Confrontation Clause permits a prosecutor to introduce a state forensic examiner's crime laboratory report against the accused as a substitute for the forensic examiner's live testimony, so long as the accused is left with the ability to subpoena the forensic examiner as part of his defense." Pet. for Cert. i. The North

Dakota Supreme Court plainly resolved that question against Petitioners, and the State does not contend otherwise. Accordingly, there is no basis for the State to argue that this Court should deny review on the ground that the question presented was not resolved below.

The State is correct, of course, insofar as it simply highlights that the North Dakota Supreme Court declined to resolve the question presented *in a particular way* – namely, by determining whether state crime laboratory reports are "testimonial" under *Crawford v. Washington*, 541 U.S. 36 (2004). But this aspect of the decision below does not introduce any impediment to this Court's resolving the question presented. As Petitioners explained in the petition for certiorari, every time a defendant objects on confrontation grounds to the government's introducing a state crime laboratory report as a substitute for a forensic examiner's live testimony, that objection raises two sub-issues: (1) whether a defendant's ability to subpoena the state forensic examiner who prepared the report obviates any confrontation issue; and (2) whether such a report is testimonial. *See* Pet. for Cert. 8, 18. Some courts, such as the North Dakota Supreme Court (Pet. App. 8a-9a), have resolved such objections by ruling against defendants on the first ground; other courts, such as the trial court here (Pet. App. 12a-16a), have resolved the issue by ruling against defendants on the second ground; and still other courts have resolved the issue by ruling against the government on both grounds and thus finding a Sixth Amendment violation. *See* Pet. for Cert. 9-18; *infra* at 4, 5, 7 (new decisions). Far from presenting vehicle difficulties, this divergence of approaches evinces exactly the kind of multi-faceted confusion that counsels in favor of granting certiorari.

Lest there be any doubt, there is nothing that could possibly be gained from waiting for a case in which a defendant challenges a decision below that was resolved on

"testimonial" grounds instead of "waiver unless subpoena" grounds. The State expressly takes the position here (as it did in the courts below) that the crime laboratory report here is nontestimonial, so this Court will receive full adversarial briefing on that score. BIO 4; Brief of Appellee, *State v. Campbell*, 2006 ND 168 (July 27, 2006), *available at* 2006 WL 2688087. And the State does not point to a single underlying fact or legal circumstance that needs to be developed in order to decide the issue. Indeed, numerous other courts have issued opinions on the topic, thus providing this Court with more than ample percolation with respect to it.[1]

II. The Conflict Among the State and Federal Courts is Real and Ever Deepening.

The State maintains that there is no "percolated lower court dispute" regarding whether a defendant's ability to subpoena a witness automatically satisfies the Confrontation Clause because (1) many of the conflicting cases pre-date *Crawford* and (2) the cases involving child witnesses instead of forensic examiners "are distinct from the present case." BIO 6-9. Neither of these contentions has merit. This division of authority is real, and it continues to deepen.

1. The State asserts that *Crawford* renders "inapposite" (BIO 6) previous decisions addressing whether a defendant's ability to subpoena an available witness allows the

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[1] Even if this Court were uncertain whether it wanted to resolve the testimonial question in this case, it would be well worth the expenditure of this Court's resources to grant review at least to resolve the propriety of the North Dakota Supreme Court's waiver-unless-subpoena holding. Courts, as Petitioners make clear in Part II, *infra*, are deeply divided on that subject, and the conflict reaches even beyond the context of state crime laboratory reports. After resolving that issue, this Court could resolve the testimonial aspect of the question presented or, if some unforeseeable reason arose to avoid that subject, this Court could simply remand the case.

government to introduce the witness's out-of-court statements in lieu of live testimony. But the State never provides any reason that this would be so. In fact, none exists.

Crawford was centrally concerned with whether a court's assessment that an out-of-court statement was reliable could satisfy the Confrontation Clause. This Court's decision did not directly address whether a defendant's ability to subpoena a witness whose out-of-court declaration the prosecution offers could satisfy the Confrontation Clause. But to whatever extent *Crawford* might be relevant to this question, it clearly did not *relax* the strictures of the Confrontation Clause. So it is plain that *Crawford* does not make the North Dakota Supreme Court's decision *more* defensible than it would have been before, which is what would have to be the case for the State's "intervening authority" suggestion to have any traction.

In any event, courts issued conflicting decisions on the question presented not only before *Crawford*, but they have done so after it as well. In addition to the North Dakota Supreme Court's decision here, the Tennessee Court of Criminal Appeals, adhering to a pre-*Crawford* decision from the Tennessee Supreme Court, has held that a defendant's ability to subpoena a forensic examiner automatically satisfies the Confrontation Clause. *State v. Kemper*, 2004 WL 2218471, at *3 (Tenn. Crim. App. Sept. 30, 2004), *appeal denied* (Tenn. 2005). The Virginia Court of Appeals – expressly following the decision at issue here in an opinion issued after the petition for certiorari was filed – has reached the same conclusion. *Brooks v. Commonwealth*, ___ S.E.2d ___, 2006 WL 3714536, at *5-*6 (Va. Ct. App. Dec. 19, 2006).[2] The Georgia Court of Appeals has invoked the same

[2] The Virginia Court of Appeals contended that it was following not only the decision at issue here but also decisions from other states that have upheld "good faith" and "notice and demand" prerequisites for

analysis in holding that the prosecution may introduce a child's videotaped statement in lieu of live testimony at trial. *Starr v. State*, 604 S.E.2d 297, 299 (Ga. Ct. App. 2004).

On the other hand, the District of Columbia Court of Appeals (that jurisdiction's high court) – in another opinion issued after the petition for certiorari was filed – and the Florida Court of Appeals have held that a defendant's ability to subpoena a forensic examiner does not allow the prosecution, over a defendant's objection, to introduce the examiner's report in lieu of live testimony. *Thomas v. United States*, ___ A.2d ___, 2006 WL 3794331, at *9-10 (D.C. Dec. 28, 2006); *Belvin v. State*, 922 So. 2d 1046, 1054 (Fla. Dist. Ct. App.), *rev. granted*, 928 So. 2d 336 (Fla. 2006). The District of Columbia Court of Appeals reversed that court's previous position and gives the issue a particularly thorough treatment. The Maryland Court of Appeals (that juris-diction's highest court) and the Texas Court of Appeals have reached the same result in cases involving other types of witnesses. *Snowden v. State*, 867 A.2d 314, 332 (Md. 2005); *Bratton v. State*, 156 S.W.3d 689, 694 (Tex. App.), *rev. denied* (Tex. 2005).

In short, no matter how the decisions respecting the question presented are temporally sorted, they are in deep and irreconcilable conflict. There is no possibility for uniformity until this Court steps in.

2. The State's suggestion that the cases involving child witnesses are inapposite because none involved a law like North Dakota's forensic examiner statute similarly lacks

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defendants' requiring the government to offer the live testimony of forensic examiners. But as the petition for certiorari explains, such statutory prerequisites are not at issue here because, when they are satisfied, the prosecution must still call the witness to the stand at trial. *See* Pet. for Cert. 10 n.2, 25 n.8. By contrast, the Virginia procedure, like the North Dakota procedure at issue here, requires the *defendant* to call the forensic examiner to testify.

merit. The petition for certiorari explains, and the State does not dispute, that the Compulsory Process Clause already affords defendants the very subpoena power that North Dakota's statute purports to give them. Pet. for Cert. 20, 26. For this reason, courts have not distinguished among types of witnesses in deciding whether a defendant's ability to subpoena a witness allows the prosecution, over the defendant's objection, to introduce the witness's out-of-court statements as a substitute for live testimony. *See Thomas*, ___ A.2d at ___, 2006 WL 3794331, at *9-10 (relying in part on child witness cases to reject government's waiver-unless-subpoena argument). *See generally* Pet. for Cert. 10-11, 13-14 (setting forth courts' analyses with respect to various types of witnesses). The North Dakota Supreme Court's decision in *State v. Blue*, 717 N.W.2d 558 (N.D. 2006), is no different in this regard. There, a trial court order "precluded [the defendant] from even attempting to call his accuser [a child] at trial," *id.* at 556, so the North Dakota Supreme Court had no occasion to consider whether the defendant's ability to subpoena the child would have allowed the State to introduce the child's out-of-court videotaped statement as a substitute for live testimony.

But as with the State's assertion regarding pre-*Crawford* cases, there is no need to dwell on this subject. Even if one considers nothing more than cases involving forensic examiners, courts are deeply and intractably divided over whether a defendant's statutory ability to subpoena such an examiner allows the prosecution to introduce the examiner's crime laboratory report as a substitute for live testimony. Three state courts of last resort and one state intermediate court have held that it does. *See* Pet. for Cert. 9-10; *Brooks*, ___ S.E.2d at ___, 2006 WL 3714356, at *3-6. One federal court of appeals, four state courts of last resort, and one state intermediate court have held that it does not. *See* Pet. for Cert. 11-13; *Thomas*, ___ A.2d at ___, 2006 WL

3794331, at *9-10. This disagreement alone is more than enough to warrant this Court's review.

3. The State does not contest that the sub-issue of whether state forensic laboratory reports are testimonial is worthy of this Court's immediate review. Petitioners, therefore, simply note that since they filed the petition for certiorari, one more state court of last resort and one more state intermediate court have held that such reports are testimonial, while one other state intermediate court have held that such a report is not. *Compare Thomas*, ___ A.2d at ___, 2006 WL 3794331, at *6-9 (report identifying substance as illegal drug), *and Deener v. State*, ___ S.W.3d ___, 2006 WL 3479941, at *3 (Tex. App. Dec. 4, 2006) (same), *with People v. Meekins*, ___ N.Y.S.2d ___, 2006 WL 3438279, at *1 (N.Y. App. Div. Nov. 28, 2006) (DNA report). This escalating divergence of authority, just as with the subpoena sub-issue, strongly militates toward prompt review.

III. The State's Harmless-Error Argument Does Not Provide a Legitimate Reason to Deny Review.

The State never contended in the North Dakota Supreme Court that any error in admitting the crime laboratory report here could be considered harmless. *See* Brief of Appellee, *State v. Campbell*, 2006 ND 168 (July 27, 2006), *available at* 2006 WL 2688087. Nor did the North Dakota Supreme Court so much as suggest that possibility. Pet. App. 1a-9a. The State nonetheless argues now that "any error that might be found in this case would be harmless" because the arresting police officer testified that he believed the items he seized contained marijuana and because Petitioners did not contest the accuracy of the report during their closing arguments. BIO 9-10.

The State's arguments do not provide any reason to believe this Court would need to deviate here from its "general custom" of reversing on the federal constitutional

issue and remanding for the lower court to consider in the first instance any harmless-error argument that might properly be advanced. *See, e.g., Lilly v. Virginia*, 527 U.S. 116, 139 (1999). The fact that the officer testified that articles in Petitioners' possession looked like and smelled like marijuana hardly dictates that the state crime laboratory report was cumulative evidence. The report purported to establish with scientific certainty that the articles that Petitioners' possessed were contraband. That is why the North Dakota Supreme Court called the forensic examiner's report the "primary evidence offered to establish the seized property contained marijuana." Pet. App. 5a-6a. And that is why the prosecutor in this very case expressly relied in his closing argument on the forensic examiner's report as providing the critical evidence that "distinguish[ed] between a legal product and an illegal product" in Petitioners' possession. Pet. for Cert. 7 (quoting Tr. 178, lines 1-9 (June 13, 2005)).

Nor does Petitioners' inability to contest the findings of the State's forensic laboratory report during closing arguments suggest that admitting the report was harmless error. This inability quite possibly derived directly from the trial court's earlier improper denial of Petitioners' confrontation objection. A core purpose of the Confrontation Clause is to permit defendants to observe witnesses' live testimony and then probe on cross-examination the accuracy of the prosecution's evidence, without having to risk harming their own cases by calling the prosecution's witnesses themselves. *See* Pet. for Cert. 21; *Amicus* Br. of Law Professors, The National Ass'n of Criminal Defense Lawyers, The Innocence Project, and The Public Defender Service for the District of Columbia, at 3-10. But the trial court improperly precluded Petitioners from doing so. One thus cannot speculate what would have been revealed or how Petitioners would have conducted their defenses if the trial court had honored their confrontation rights.

CONCLUSION

For the foregoing reasons, as well as those in the petition for writ of certiorari, the petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

THOMAS D. PINKS and BILLIE JO CAMPBELL,
Petitioners,

v.

NORTH DAKOTA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of North Dakota

BRIEF OF *AMICI CURIAE* PROFESSORS PAUL C. GIANNELLI, PAMELA R. METZGER, AND ANDREW E. TASLITZ, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE INNOCENCE PROJECT, AND THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici Curiae in support of Petitioners are Professors of Law with expertise in issues of forensic science, criminal procedure, and constitutional law. *Amici* also include the National Association of Criminal Defense Lawyers ("NACDL"), a non-profit association of criminal defense lawyers with a national membership of more than 10,000 attorneys, the Public Defender Service for the District of Columbia ("PDS'), which represents indigent criminal defendants, and the Innocence Project, a leader in the exoneration of the wrongfully convicted, which, in the course of its work, has exposed some of the forensic science failures discussed in this brief.[1] As scholars training future practitioners and practitioners representing clients, *Amici* have a keen interest in knowing whether and how the Sixth Amendment's Confrontation Clause applies to state forensic examiner reports.[2]

In the wake of *Crawford v. Washington,* 541 U.S. 36 (2004), and *Davis v. Washington*, 126 S. Ct. 2266 (2006), the most widespread subject of controversy with respect to the confrontation guarantee concerns the constitutionality of allowing the prosecution to introduce state forensic examiner reports in lieu of live testimony so long as the defendant is able to subpoena the examiner to testify for the defense. This practice poses serious problems because it fundamentally alters the structure of a criminal trial, diminishes its truth-seeking function, and ultimately threatens the integrity of our

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[1] Accompanying this brief are letters of consent to its filing. No counsel for any party authored any part of this brief, and no person or entity, other than *Amici*, has made a monetary contribution to the preparation or submission of this brief.

[2] Professors Giannelli, Metzger and Taslitz have published extensively on topics related to the issues discussed in this brief, and Professor Taslitz is a former state prosecutor. NACDL has appeared as *amicus curiae* in *Crawford v. Washington*, 541 U.S. 36 (2004) and also appeared with PDS as *amicus curiae* in *Davis v. Washington*, 126 S. Ct. 2266 (2006).

criminal justice system. To delay comprehensive guidance will perpetuate confusion and facilitate injustice in a substantial number of criminal cases nationwide.

SUMMARY OF ARGUMENT

Amici support Petitioner's arguments in support of a Writ of Certiorari in full. *Amici* write separately to explain the practical import of the traditional construction of the right to confrontation in operation, where the prosecution must affirmatively present live witness testimony to sustain its burden of proof and the defense, absent a knowing and intelligent waiver, always has the opportunity to confront and cross-examine that witness as it sees fit, if it sees fit. Specifically, *Amici* explain how the traditional construction of the confrontation guarantee allocates risks, creates incentives, and ultimately promotes the truth-seeking function of a criminal trial.

Amici also write to alert the Court to the systemic problems with unreliable scientific data that coincided with the permissive practice under *Ohio v. Roberts*, 448 U.S. 56 (1980), of admitting at trial unconfronted, purportedly reliable information. The demonstrated fallibility of state forensic examiner evidence, particularly when it is regularly exempted from the rigors of adversarial testing, reinforces the importance of the questions presented by Petitioner and militates in favor of this Court's review.

REASONS FOR GRANTING THE PETITION

I. HOW THE CONFRONTATION GUARANTEE IS PROPERLY SATISFIED IMPLICATES THE FUNDAMENTAL WORKINGS OF OUR ADVERSARIAL CRIMINAL JUSTICE SYSTEM AND ITS TRUTH-SEEKING FUNCTION.

In *Crawford*, this Court decoupled the right to confrontation from hearsay rules and held that a defendant's right to confrontation was implicated whenever the prosecution

sought to introduce "testimonial" evidence. But the Court did not expressly resolve, because the issue was not squarely before it, *how* the confrontation guarantee may be satisfied.

Traditionally, the Confrontation Clause has been interpreted to require (absent a valid waiver[3]) that the prosecution "confront" a defendant "with" its witnesses in the prosecution's case-in-chief. U.S. Const. amend. VI. Under this construction of the confrontation guarantee, there are always a variety of factors that will impede the admission of erroneous, incomplete, or fraudulent evidence.

To begin with, the prosecution, in order to sustain its burden of proof, bears the risk of presenting inherently revealing, live testimony. Thus the prosecution, which presumably knows the strengths and weaknesses of its evidence and its witnesses, cannot, over defense objection, simply conduct a trial-by-affidavit, putting out-of-court written statements before the fact-finder that say no more and no less than the prosecution wants them to say. Rather, the prosecution is obliged to put a live witness on the stand and bear the risk that this witness may provide, even on direct, some information that is inconsistent with prior statements or otherwise unhelpful or damaging to the prosecution's case.

Relatedly, under the traditional system, when a defendant stands on his right to confrontation, there is always the *opportunity* for adversarial testing. Certainly, when the prosecution calls its witness to the stand, it fulfills a number of the components of the confrontation guarantee, including (1) "face-to-face" confrontation with the defendant, *Crawford*, 541 U.S. at 57; (2) open presentation of evidence "in the presence of all mankind," Sir William Blackstone, 3 *Com-*

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[3] The traditional system does not require confrontation in every case. It is always the prosecution's prerogative to ask the defense to stipulate to the admission of unconfronted out-of-court statements. However, if the defense declines such a request, the prosecution retains the burden of production and the defense the opportunity for cross-examination.

mentaries on the Laws of England *373 (1765-69 ed.),[4] and (3) the fact-finder's first-hand "opportunity [to] observ[e] the quality, age, education, understanding, behavior, and inclinations of the witness; in which points all persons must appear alike, when their depositions are reduced to writing." *Id.* at *374.

But most important in the context of this discussion, when the prosecution is required to call a witness to the stand, the defendant always has a real opportunity to challenge this evidence via cross-examination as he sees fit (if he sees fit). This opportunity bears no risk for the defendant because the defendant is not obligated to choose whether or how to question the prosecution witness until after that witness has testified on direct and after the prosecution has presumably obtained from the witness whatever inculpatory information the witness possesses. At this point, the defense can make an informed decision to cross-examine the prosecution witness to expose holes, inconsistencies, biases, or untruths in the witness' testimony. Alternatively, the defense may decide to forego cross-examination—for any number of legitimate reasons. It may be that the witness (a) now under oath, failed to testify in a way that materially hurts the defendant, or (b) actually testified poorly for the prosecution (and thus favorably for the defense), and might only qualify his answers on cross-examination, or (c) in anticipation of cross-examination, was so scrupulous in his testimony that cross-examination would only emphasize the strength of the prosecution's evidence.

And precisely because the traditional construction of the confrontation right ensures a routine and uniform opportunity for the defense to confront and cross-examine prosecution witnesses, it creates an incentive structure for the prosecution and its witnesses to ensure at every stage of the prosecution

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[4] *Available at* http://www.yale.edu/lawweb/avalon/blackstone/bk3ch23.htm.

that the evidence is accurate and reliable in order to limit defense opportunities for impeachment.

The spectre of cross-examination provides an incentive for the prosecution to present a complete warts-and-all picture of its case to "draw the sting" from any attempt at impeachment—which in turn allows the fact-finder to render its verdict with more complete information. Likewise, the combination of being face-to-face with the accused and the possibility of cross-examination will likely deter prosecution witnesses from over-statement and misleading omissions when they are on the stand, especially where they have been instructed that such tactics will likely only backfire. Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 501 n.122 (2006) (almost all state employees who may be called to testify in criminal trials receive training on how to be a good witness).

In addition, even before the prosecution's first witness takes the stand, the traditional system of confrontation and cross-examination gives prosecution witnesses prophylactic incentives to exercise greater care in the creation or maintenance of prosecution evidence—to set up and follow protocols that adhere to best practices, to ensure all staff are properly trained, to properly document everything, and to strive in all ways to operate in a manner that is beyond reproach—and thereby to minimize if not avoid entirely damaging impeachment. *See* Metzger, 59 Vand. L. Rev. at 501. Similarly, the spectre of cross-examination prompts good prosecutors to rigorously vet their cases—to strengthen those cases that do go to trial by thoroughly reviewing the evidence with their witnesses and ensuring that errors, omissions, and oversights will be addressed and remedied before the witness testifies in open court, and to dismiss cases based on flawed evidence before the trial ever begins.

In short, the very structure of the traditional conception of the confrontation guarantee promotes the truth-seeking function of a criminal trial. But a number of states, North Dakota among them, have endorsed a very different con-

struction of the right to confrontation whereby a defendant "waives" the right to confront prosecution witnesses if he fails to subpoena them to testify for the defense.[5] Under this "waiver"-unless-subpoena construction of the confrontation guarantee, the prosecution does not bear the risk of presenting live witness testimony. Rather, the prosecution may present out-of-court testimony in its case-in-chief, and it is the defendant that must decide whether to chance calling the prosecution's witnesses to the stand in the defense case to provide in-court testimony. This strategy is incredibly risky: the defendant must call a witness to the stand who he knows will provide some measure of inculpatory information, "invite her to repeat the damaging account, this time live in front of the jury, then try to shake her – and if he comes up empty-handed, try to explain to the jury why he bothered with the whole exercise." Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L. J. 1011, 1037 (1998).

This risk is only heightened when the defense is forced to examine on direct a prosecution witness with little or no discovery. State forensic examiners often align themselves with the prosecution,[6] are unlikely to voluntarily speak to the defense prior to trial, and are unlikely to be ordered by courts to do so. *See, e.g., In re J.W.*, 763 A.2d 1129, 1134-37 (D.C. 2000) (defendant has no right to pretrial interview of

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[5] For the reasons discussed above, Amici question the legitimacy of such a "waiver." *See Brady v. United States*, 397 U.S. 742, 748 (1970) (waivers of constitutional rights must be knowing, intelligent and voluntary); *Halbert v. Michigan*, 125 S. Ct. 2582, 2594 (2005) (defendant could not waive right that state statute affirmatively denied).

[6] Maurice Possley et al., *Scandal Touches Even Elite Labs: Flawed Work, Resistance to Scrutiny Seen Across U.S.*, CHI. TRIB., Oct. 21, 2004 (lab analyst explains: "We work for the good guys. We're the white hats."); *see also* Paul C. Giannelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 Vand. L. Rev. 791, 799 nn.52 & 53 (1991) (vast majority of crime laboratories in the United States are under police control and only examine evidence submitted by law enforcement).

government chemist to determine whether or not to subpoena him to testify at trial). Moreover, the defendant may have little ability to learn more from other sources about the examiner and his actions in the case. The report itself is likely to be cursory. Paul C. Giannelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 Vand. L. Rev. 791, 803 (1991) (lab reports often merely "summarize[] the results of an unidentified test conducted by an anonymous technician") (internal quotation and citation omitted); *see, e.g.*, Pet. App. 19a (documenting only the "substance[s] found"— "Cannabis (Marijuana)" and "Resin of Cannabis (Marijuana)").[7] Moreover, the defendant's right to obtain discovery from the prosecution related to the examiner and his report may be unclear because normal discovery rules are unlikely to apply to a situation where the prosecution is not calling the author of the report to the stand.[8] Finally, these examiners may, in fact, be hostile to the defense, and yet, because they are

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[7] *See also* Paul C. Giannelli, *Forensic Science*, 34 J. L. Med. & Ethics 310, 315 (2006) (current rules requiring discovery of scientific reports generally do not specify the information that must be included; suggesting changes that require "(a) a description of the analytical techniques used in the test . . . (b) the quantitative or qualitative results with any appropriate qualifications concerning the degree of certainty surrounding them, and (c) an explanation of any necessary presumptions or inferences that were needed to reach the conclusions") (internal quotation and citation omitted).

[8] In jurisdictions that have patterned their discovery rules on the federal Jencks Act—*see, e.g.*, D.C. Sup. Ct. Crim. R. 26.2, W.Va. R. Crim. P. 26.2—the defendant who calls a prosecution witness to the stand receives nothing from the prosecution beforehand because the disclosure obligation mandated by the Jencks Act was established with our traditional adversarial process in mind. Thus, it prohibits disclosure of government witness statements and reports to the defense "until said witness has testified on direct examination in the trial of the case," 18 U.S.C. § 3500(a), and it mandates disclosure of statements to the defense "[a]fter a witness called by the United States has testified on direct examination." 18 U.S.C. § 3500(b); *see also* Fed. R. Crim. P. 26.2 (mandating disclosure of statements "on a motion of a party who did not call the witness").

ostensibly "neutral scientists" testifying for the defense, it may be difficult for the defense to persuade the Court to permit the use of leading questions.

Under these circumstances, very few defendants would blindly call a prosecution witness in the defense's case. Thus, as a practical matter, the offer of even some components of the traditional right to confrontation under the "waiver"-unless-subpoena rule is illusory. This construction of the confrontation guarantee ostensibly affords a defendant all but one (cross-examination) of the protections assured by the traditional confrontation right, and for that component, purports to offer the (poor) substitute of direct examination, but because of the manner it which it reallocates risks from the prosecution to the defense, it severely limits *any* opportunity for any sort of in-court, adversarial testing.

Even when the defense does gamble and blindly calls a prosecution witness in the "waiver"-unless-subpoena system, the questioning of this witness in the defense case is likely to be far less effective than cross-examination of the same witness in the prosecution's case-in-chief and has the potential to damage the defense in ways distinct from a failed cross-examination. Before the defendant can attempt to impeach the witness, he will have to establish the witness' credentials as an expert and elicit his damaging expert opinion. In so doing, there is always a danger that the jury will inaccurately perceive that the defense is vouching for the witness. *See* Robert J. Klonoff & Paul L. Colby, *Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials*, 36-37 (1990) (juries evaluate evidence by reference to the party introducing it; evidence unfavorable to a party is more damaging when the party introduces it than it is when the party's opponent introduces the same evidence). Additionally, the defendant may be prejudiced by the perhaps days delay between the prosecution's presentation of unconfronted hearsay and the defendant's in-court examination of the

declarant of this statement; it may simply be too late for effective impeachment because, by this time, "an impression of the jury has been made." *New York Life Ins. Co. v. Taylor*, 147 F.2d 297, 305 (D.C. Cir. 1945) ("only a lawyer without trial experience would suggest that the limited right to impeach one's own witness is the equivalent of that right to immediately cross-examination"); *accord* Richard Friedman, The Confrontation Blog, *Shifting the Burden*, March 16, 2005, *available at* http://confrontationright.blogspot.com/2005/03/shifting-burden.html. Similarly, where a defendant introduces the prosecution's evidence solely to challenge it, he may disrupt his attempt to focus the fact-finder on his affirmative defense presentation. *Id.*

For all of these reasons, the "waiver"-unless-subpoena construction of the confrontation guarantee creates strong incentives for a defendant *not* to exercise his right to confrontation, and concomitantly strong incentives for the prosecution to introduce as much of its evidence as possible through out-of-court statements and documentary evidence. While a defendant may waive the confrontation guarantee under either the traditional or "waiver"-unless-subpoena construction of that right, the latter construction forces more unknowing and involuntary waivers. Indeed, the cost-saving rationale for this "waiver"-unless-subpoena rule appears to be based on the premise that it will substantially reduce live testimony by forensic examiners. Metzger, 59 Vand. L. Rev. at 528-31.

But by making in-court confrontation an uncommon and irregular occurrence, the "waiver"-unless-subpoena construction of the confrontation right robs the adversarial system of many of the incentives that promote the truth-finding function of a criminal trial. The declarant of an out-of-court statement for the prosecution does not have the same incentives that are present under the traditional construction of the confrontation guarantee to cautiously and conscientiously create and preserve evidence from the outset in order to avoid the possi-

bility of impeachment. Rather, with statements submitted in writing, information can easily be spun, misrepresented, omitted or fabricated precisely because no follow-up questioning is afforded. And, if lightening strikes, and this prosecution witness is called to testify in the defense case, he does not have the same incentives to testify precisely and comprehensively about his actions. A hostile witness, who knows his adversary is asking questions blindly without meaningful discovery, may testify as he wishes with little fear that misrepresentations and obfuscations will be detected.

Likewise, when the prosecution has little or no expectation that its witnesses will ever have to take the stand, it has little or no incentive to scour its evidence and vet its witnesses. It simply makes no sense for the prosecution to go the extra mile to ensure that its proof is as strong as it can be if there is no realistic probability of adversarial scrutiny. This has the potential to be particularly problematic in the context of conclusory state forensic examiner reports. The prosecution will be less inclined to probe the bases for a report's conclusions—the methodology and protocols the examiner used—because without a realistic probability of confrontation, they will never become an issue at trial. And yet, because of this lack of scrutiny, the prosecution may unwittingly rely on conclusions that are faulty or without foundation. By the same token, the prosecution, which always has the incentive in our adversarial system to put the best gloss on its case, will not have the incentive to take the utmost care to screen out misstatements and overreaching by its witnesses. Finally, because the checks and balances of the adversarial system are severely weakened when in-court testimony is unlikely, the prosecution has no incentive at trial to voluntarily reveal potential inconsistencies or affirmatively explain problems or errors to "pull their sting."

Amici believe that the "waiver"-unless-subpoena construction of the confrontation right is wholly inconsistent with our adversarial system. *See Barefoot v. Estelle*, 463 U.S. 880, 899

(1983) (our "adversary system" is designed to "uncover, recognize and take due account" of the "shortcomings" of expert evidence); *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993) (endorsing "[v]igorous cross-examination" as a means of attacking scientific evidence). *Amici* urge the Court to grant review in this case to declare that the traditional method of fulfilling the confrontation guarantee is the only constitutionally acceptable method.

This issue goes well beyond the unconfronted admission of state forensic examiner reports. It is the nature of our adversarial system that the prosecution will constantly push to limit its confrontation obligations. Thus, the recognition by a number of states of any rule for state forensic examiners more lenient than one requiring the prosecution to present live testimony subject to cross-examination by the defense creates a dangerous slippery slope. If it is permissible to shift the risk of presenting live testimony to the defense and, as a practical matter, to so constrict the opportunity for in-court adversarial testing of live witnesses, then it would presumably no more offend the Constitution to allow the prosecution to prove its entire case by affidavit, no matter the precise type of out-of-court statement at issue. *See People v. McClanahan*, 729 N.E. 2d 470, 477 (Ill. 2000) (acknowledging this danger); *see, e.g., Starr v, State*, 604 S.E.2d 297, 299 (Ga. Ct. App. 2004) (permitting introduction of alleged victim's videotaped statement in lieu of live testimony where defense could have called her as a witness). In other words, the "waiver"-unless-subpoena rule threatens not only to undo the importance of the *Crawford* and *Davis* decisions, which reaffirmed importance of live testimony, in court, subject to cross-examination, but also to "dramatic[ally] change . . . the way we conduct criminal trials." Friedman, 86 Geo. L. J. at 1038. With such basic principles at stake, the Court's corrective intervention is urgently needed.

II. WHETHER STATE FORENSIC EXAMINER EVIDENCE IS TESTIMONIAL AND SUBJECT TO TRADITIONAL CONFRONTATION GUARANTEES IMPLICATES THE INTEGRITY OF OUR CRIMINAL JUSTICE SYSTEM.

Whether state forensic examiner evidence is testimonial and subject to confrontation under the traditional construction of that right implicates the integrity of our criminal justice system. We need only look back to recent history for proof. During the *Roberts* era, a defendant's right to confrontation and cross-examination of a prosecution witness was downgraded from a categorical constitutional guarantee to a highly arbitrary judicial determination of evidentiary reliability. At the same time, some states (erroneously) concluded that the mechanism for fulfilling the confrontation obligation, in the more limited instances that obligation was recognized under *Roberts,* could be altered in such a way as to further constrict the scope of the right. In particular, some states endorsed the use of purportedly inherently reliable forensic examiner reports in lieu of live testimony so long as a defendant had an opportunity to subpoena the examiner to testify. From the vantage of hindsight, the result was predictable; the *Roberts* era coincided with widespread crime laboratory failures around the country.

Lest history repeat itself, this Court should use Petitioner's case as a vehicle to expressly reject the permissive admission of unconfronted forensic evidence and affirm that the traditional strictures of the confrontation right regulate the admission of such evidence. Indeed, it is particularly urgent that the Court resolve this issue in the wake of *Crawford.* Again, it is characteristic of our adversarial system that its actors will always seek strategic advantage and thus the prosecution will seek to avoid the risk and hard work that attends in-court confrontation of its witnesses. Now that the *Roberts* regime has been rejected, reliance on a "waiver"-unless-subpoena construction of the confrontation guarantee

will be the prosecution's most attractive option for avoiding the rigors of its traditional confrontation obligations.

The ability to confront and probe scientific evidence is critical because it is often the most powerful evidence in the prosecution's arsenal, and is considered to be extremely reliable and persuasive by juries. In a survey of potential jurors in the District of Columbia, respondents said that, on a scale of one to ten, fingerprint and DNA evidence rated 8.3 and 9 respectively for general persuasiveness, and 8.6 and 9 for general reliability; likewise 94% of those polled deemed "important" laboratory and scientific tests performed by the government that provided favorable evidence to the defense, and 91% of those polled said that they would be concerned if the prosecution withheld this information from the defense. *See* Survey of D.C. Jurors conducted by the Public Defender Service in December 2003, questions 3, 6, 17, 20, 57, & 71.[9]

This reliance is potentially dangerous because this sort of evidence is no more immune to human error or bias than any other type of evidence. Thus, in the review of the first 74 DNA exoneration cases analyzed by the Innocence Project *one third* involved "tainted or fraudulent science." Barry Scheck et al., *Actual Innocence: When Justice Goes Wrong and How to Make It Right*, 365 (2003); *see also* Possley, *Scandal Touches Even Elite Labs* (examination of first 200 exoneration cases since 1986 revealed than "more than a quarter involved faulty crime lab work or testimony"). Indeed, our *Roberts*-era history suggests that forensic evidence, just like any other type of evidence, is more susceptible to human error and misrepresentation when it is shielded from confrontation.

During the *Roberts* era, the confrontation guarantee turned on judicial estimations of evidentiary reliability and in-court

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[9] The Survey is available at http://www.pdsdc.org/SpecialLitigation/SLDSystemResources/Brady%20Poll%20Results,%20December%202003.pdf.

confrontation was generally devalued. *See Roberts*, 448 U.S. 56. At the same time, the practice of allowing the prosecution to introduce a state forensic examiner's report against the accused as a substitute for the forensic examiner's live testimony gained currency and proliferated rapidly. Pet. at 25. Conclusory declarations about the results of a "wide range" of forensic tests—including drug tests, "DNA tests, microscopic hair analyses, fingerprint identifications, coroners' reports, [and] ballistics tests," were exempted from the strictures of the Confrontation Clause. Metzger, 59 Vand. L. Rev. at 479 n.12. Demonstrating the influence of *Roberts*, the oft-cited justification for the permissive use of these unconfronted forensic laboratory reports was their inherent reliability. *Id.* at 480 n.15.

Ironically, the *Roberts*-era attitude that confrontation was discretionary and dispensable for "reliable" evidence can only have created an atmosphere which facilitated the creation and admission of unreliable evidence at trial precisely because the work of state forensic examiners was largely insulated from meaningful scrutiny. It would be an overstatement to say that confrontation is the cure-all for faulty forensic evidence; there will always be some people who are willing to take the stand and affirmatively lie or withhold information that might expose their testimony to be falsely premised or unreliable. But in-court confrontation works in concrete ways to deter the creation and use in court of sloppy, inaccurate, or falsified forensic work. *See* Point I *supra*; *see also Crawford*, 541 U.S. at 61 (confrontation identified as the procedural mechanism through which "reliability *can best be* determined") (emphasis added).

And, in fact, the practice of insulating the work of state forensic examiners from the crucible of adversarial testing coincided with a disconcerting number of systemic laboratory errors and failures around the country. Flaws with the administration and operation of state forensic laboratories and the evidence they generated during this time have been

uncovered in virtually every state or locality in the country, as well as in the federal system, and are well-documented in Baltimore, Chicago, Cleveland, Los Angeles, Montana, Oklahoma City, Texas (Houston, Fort Worth, and West Texas), Virginia, Washington, and West Virginia. *See* Appendix of Sample Crime Laboratory Failures from Around the Country During the *Roberts* Era ("App. of Crime Lab Failures"). In these jurisdictions, the same types of human error that can undermine the reliability of any other type of evidence—overwork, inattention, bias, lack of training, outright dishonesty—compromised the reliability and probity of laboratory tests and the reports of those test results. *Id.*

The Houston Police Department Crime Laboratory is perhaps the paradigmatic example of a failed forensic agency. According to one state senator, "the validity of almost any case that has relied upon evidence produced by the lab is questionable." Rodney Ellis, Editorial, *Want Tough on Crime? Start by Fixing HPD Lab*, HOUSTON CHRONICLE, Sept. 5, 2004. Specifically, a state audit revealed a dysfunctional organization with serious contamination issues and an untrained staff using shoddy science, including poor calibration and maintenance of equipment, improper record keeping, and a lack of safeguards against contamination, and a leaky roof which flooded boxes of biological evidence.[10] Other problems were discovered with the toxicology, serology, and ballistics units of the lab.[11] In addition, several

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[10] *Quality Assurance Audit of Houston Police Dep't Crime Laboratory—DNA/Serology Section* (Dec. 12-13, 2002), *available at* http://www.pdsdc.org/resources/dna/QA_Audit_for_DNA_databasing_labs.pdf.

[11] *See* Ralph Blumental, *Double Blow, One Fatal, Strikes Police in Houston*, N.Y. TIMES, Oct. 30, 2003, at A23 ("The Houston police chief announced on Wednesday that he had shut down the Police Department's toxicology section after its manager failed a competency test . . . ."); *Fourth Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room* at 3-4 (Jan. 4, 2006) *available at* http://www.hpdlabinvestigation.org/reports/060104report.pdf.

instances of "drylabbing"—that is, the fabrication of scientific results—were documented in the controlled substances division.[12] Further investigation revealed widespread problems, including inadequate documentation and a failure to follow generally accepted forensic science practices and laboratory procedures.[13]

West Virginia too provides a cautionary tale about the systemic problems that can render forensic evidence wholly unreliable. After the DNA exoneration of Glen Dale Woodall, the Prosecuting Attorney for Kanawha County requested a judicial investigation into the work of the serology department at the West Virginia Department of Public Safety; a separate investigation was also conducted by the American Society of Crime Laboratory Directors (ASCLD). *See In Re Investigation of West Virginia State Police Crime Lab, Serology Division*, 438 S.E.2d 501, 503 (W.Va. 1993). Both the Court and ASCLD found that the serologist involved in the Woodall case routinely overstated results, provided misleading statements about his results, failed to report exculpatory results, failed to follow-up on conflicting results, and reported scientifically impossible or

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(documenting "pervasive and serious problems with the quality of scientific work performed by the serologists, as well as with the presentation of the results obtained"); Possley, *Scandal Touches Even Elite Labs,* (firearms examiner misreported caliber of bullet in order to connect gun to defendant); *see also* Roma Khanna & Steve McVicker, *Fingers Pointed at HPD Crime Lab in Death Row Case*, HOUSTON CHRONICLE, April 24, 2003.

[12] *See Third Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room* at 31-36 (June 30, 2005), *available at* http://www.hpdlabinvestigation.org/reports/050630report.pdf.

[13] *See Fifth Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room* at 66-67 (May 11, 2006), *available at* http://www.hpdlabinvestigation.org/reports/060511report.pdf.

improbable results. They also found evidence that the serologist's supervisors ignored or concealed complaints about his work. Both concluded that laboratory operating procedures—which, among other things, did not require written documentation of methodology, lacked auditing requirements, lacked written protocols, and failed to follow accepted scientific protocols—"undoubtedly contributed to an environment within which [the serologist's] misconduct escaped detection." *Id.* at 504.

A guarantee of routine in-court confrontation might have averted problems like these. Confrontation might have prompted the crime laboratories in these jurisdictions to act with greater care from the outset. Part of the problem is that many of the lab failures documented above would not be discernable from state forensic examiner reports used by the prosecution. As noted above and as was the case below, *see* p. 7 *supra*, these reports often incorporate only the examiner's bare conclusions without providing any information about the tests performed, the manner in which tests were conducted, laboratory protocols, departure from these protocols and the reasons therefore, or error rates. Thus the act of writing the report does not require self-scrutiny by the examiner, and hence provides little incentive either to conduct tests properly and carefully or to report their results accurately. The expectation of in-court confrontation provides these incentives, however, and thus can reduce the susceptibility of this evidence to error.

If it did not preempt them, a guarantee of routine confrontation could have also prompted or hastened the in-court exposure of these systemic problems. The types of errors and problems that have been discovered – disregard for protocols in conducting lab tests, lack of meaningful protocols, falsification of credentials by forensic examiners, fabrication of test results, utilization of junk science techniques or other flawed forensic methodology, pro-government bias, misreporting of actual test results, *see* App. of

Crime Lab Failures—are the very types of mistakes and misconduct that the crucible of adversarial testing is generally designed to deter and reveal. A forensic examiner may think twice about making unsupported, inaccurate or false statements when testifying in open court. In addition, defense counsel has the opportunity with the examiner on the stand to contrast inadequate protocols and methodologies with best practices, expose error rates and bias, question training, and reveal all the inconsistencies and implausibilities inherent in testimony that lacks adequate foundation or contains actual falsehoods. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 447 (1995) (through cross-examination defense counsel could have "laid the foundation for a vigorous argument that the police had been guilty of negligence")[14]; *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986) (right to confrontation encompasses right to cross-examine prosecution witnesses for bias); *United States v. Davis*, 14 M.J. 847, 848 n.3 (A.C.M.R. 1982) (cross-examination of a "chemist may reveal the possibility of laboratory error due to the carelessness").

Without in-court confrontation, there is little assurance that defense counsel will be able to probe any of these matters effectively, if at all. Indeed, it is telling that, although the crime laboratory errors and problems documented above occurred almost exclusively in criminal prosecutions, they were uncovered largely outside of the criminal trial process. Often long after the fact, the unreliability of laboratory test results and reports relied on in criminal trials was brought to

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[14] The prosecution is obliged to turn over *Brady* information to defense counsel for this precise purpose. *Id.* at 446 n.15 (When "the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it."); *Smith v. Secretary of New Mexico Dep't of Corrections*, 50 F.3d 801, 830 (10th Cir. 1995) (*Brady* obligation encompasses information "would have been useful in discredit[ing] the caliber of the investigation").

light by media exposés, civil suits and post-conviction proceedings that afforded meaningful discovery, whistle-blowers, and innocence commissions examining the causes of wrongful convictions. *See* App. of Crime Lab Failures.

Even in the smaller subset of cases under *Roberts* where it was deemed necessary, in-court confrontation revealed laboratory errors and problems, thus demonstrating the very efficacy of adversarial testing to "beat[] and bolt[] out the Truth." *Crawford*, 541 U.S. at 62 (internal citation and quotation omitted). The cross-examination of a police chemist about her testing of blood evidence in a Baltimore County, Maryland case is illustrative. The chemist acknowledged that "she did not understand the science behind many of the tests that she performed," and "she did not perform a number of standard tests on the blood samples in the case." Stephanie Hanes, *Chemist Quit Crime Lab Job After Hearing, Papers Show; She Acknowledged Report Was Worthless In 1987,* Balt. Sun, Mar. 19, 2003, at B1. She also "agreed that other tests she had completed were useless" and "acknowledged that she had failed to record the results of some testing steps needed to ensure accuracy in blood typing." *Id.* Finally, she acknowledged at the conclusion of cross that, "as a result of all this" "there [wa]s not one finding, one result in this report that [wa]s usable" and that her "entire report . . . [her] entire analysis [wa]s absolutely worthless." *Id.*[15] Cross-examination had similarly beneficial results in *Ragland v. Kentucky*, 191 S.W.3d 569, 581 (2006), where an FBI bullet lead composition analyst was caught in a lie by defense counsel on cross-examination, confronted with her earlier statements, and eventually forced to admit that her prior statements were false.

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[15] This chemist also tested blood evidence in DNA-exoneree Bernard Webster's case, but the prosecutor opted not to call her as a witness because he "didn't want to complicate" the case by allowing the defense to conduct what he anticipated would have been "a nasty cross-examination." Hanes, *Chemist Quit Crime Lab, supra.*

Later, the analyst admitted, "[i]t was *only after the cross-examination at trial* that I knew I had to address the consequences of my actions." *Id.* (emphasis added).

The errors and failures of forensic evidence detailed above expose the bankruptcy of the argument that confrontation is unnecessary in the area of forensic science because of its inherent reliability. They also demonstrate how concerns about the "cost" of presenting live-witness testimony by forensic examiners are, at best, penny-wise and pound-foolish. Time away from the laboratory and transportation to the courthouse are not the only costs implicated. There are also real costs to a suspension of confrontation: wrongful convictions, attendant civil suits, loss of public trust, and, in some cases, the failure to apprehend the true perpetrator. *See In Re Investigation of West Virginia State Police Crime Lab, Serology Division*, 438 S.E.2d at 508 (systemic forensic failures "stain our judicial system and mock the ideal of justice under the law").

The recent and extensive history of laboratory errors and failures demonstrates why it is critical for this Court to determine post-*Crawford*, whether state forensic examiner evidence is testimonial and thus subject to the traditional strictures of the confrontation clause, a question this Court should expressly answer in the affirmative.

CONCLUSION

For all the reasons set forth above, the Petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX OF SAMPLE CRIME LABORATORY FAILURES FROM AROUND THE COUNTRY DURING THE ROBERTS ERA

Baltimore, Maryland: In Baltimore County, a county-employed forensic chemist resigned after acknowledging at a preliminary hearing in a murder case that she did not understand the science involved in her serology work, that she failed to perform standard tests in the case, and that she had failed to properly record her test results. *See* Stephanie Hanes, *Chemist Quit Crime Lab Job After Hearing, Papers Show; She Acknowledged Report Was Worthless In 1987*, BALT. SUN, March 19, 2003, at B1, *available at* 2003 WLNR 2015229. Police acknowledged an independent audit of her work was warranted after her testimony in the case of Bernard Webster came to light and was characterized as "within the definition of material perjury." *Id.* Webster spent twenty years in prison for rape before being exonerated by DNA evidence. *Id.*

Chicago, Illinois: Prompted by DNA exonerations, journalists have now uncovered many instances in which forensic examiners in the Illinois State Police crime laboratory in Chicago stretched lab reports so as to inculpate defendants who turned out to be innocent, in part because analysts in Illinois are funded by police agencies and state law mandates they serve the prosecution. *See* Steven Mills, et.al., *When Labs Falter, Defendants Pay*, CHI. TRIB., Oct. 20, 2004, at 1, *available at* 2004 WLNR 19847167. An independent review in connection with a civil case has uncovered many additional problems with the Chicago Police crime laboratory, including poor supervision, lack of protocols and inadequately trained staff. Maurice Possley, *et al.*, *Crime Lab Disorganized, Report Says Consultant Alleges Meager Supervision, Inadequate Training*, CHI. TRIB., Jan. 15, 2001, at 1, *available at* 2001 WLNR 10599710.

Cleveland, Ohio: In Cleveland, a state forensic examiner vastly overstated the importance of largely irrelevant serological test results, resulting in the wrongful conviction of Michael Green. The city agreed to settle Green's civil case for $1.6 million and a commitment to look into the 100 cases that included the same forensic laboratory worker who testified falsely at Green's rape trial. *See* Connie Schultz, *City to Pay $1.6 Million for Man's Prison Time*, PLAIN DEALER, June 8, 2004, at A1, *available at* 2004 WLNR 20474898.

Fort Worth, Texas: The Fort Worth Police Department's crime laboratory was forced to review almost 100 cases—three years' worth of DNA evidence—when a proficiency test revealed a senior forensic examiner did not follow proper procedures and protocols. Deanna Boyd, *Crime Lab Subject of Criminal Inquiry*, FT. WORTH STAR-TELEGRAM, April 13, 2003 at 1. The laboratory's work had been questioned but remained unaddressed for three years, despite additional issues of case backlogs, staff shortages and an "inadequate facility." *Id.*

Houston, Texas: The Houston Police Department Crime Laboratory was exposed in a series of investigative news reports that aired on KHOU–Channel 11, a local Houston television station. The story led to an audit, which revealed a dysfunctional organization with serious contamination issues and an untrained staff using shoddy science, including poor calibration and maintenance of equipment, improper record keeping, and a lack of safeguards against contamination, and a leaky roof which flooded boxes of biological evidence. QUALITY ASSURANCE AUDIT OF HOUSTON POLICE DEP'T CRIME LABORATORY – DNA/SEROLOGY SECTION (Dec. 12-13, 2002), *available at* http://www.pdsdc.org/resources/dna/QA_Audit_for_DNA_databasing_labs.pdf. Five reports were issued by the Independent Investigator of the Houston Police Department and Property Room between May 31, 2005 and

May 11, 2006 documenting extensive problems in nearly every division of the laboratory. *See, e.g.*, THIRD REPORT OF THE INDEPENDENT INVESTIGATOR FOR THE HOUSTON POLICE DEPARTMENT CRIME LABORATORY AND PROPERTY ROOM at 1 (June 30, 2005) *available at* http://www.hpdlabinvestigation.org/reports/050630report.pdf; FIFTH REPORT OF THE INDEPENDENT INVESTIGATOR FOR THE HOUSTON POLICE DEPARTMENT CRIME LABORATORY AND PROPERTY ROOM at 66-67 (May 11, 2006) *available at* http://www.hpdlabinvestigation.org/reports/060511report.pdf.

Western Texas: A contract medical examiner, Dr. Ralph Erdmann, who worked in more than 40 rural counties in Texas beginning in the early 1980s, and may have performed up to 400 autopsies a year, was convicted of seven felony counts (spanning three counties) of falsifying autopsies. Roberto Suro, *Ripples of a Pathologist's Misconduct in Graves and Courts of West Texas*, N.Y. TIMES, November 22, 1992 at 22, *available at* 1992 WLNR 3309847. Suspicion arose about Erdmann when he listed in an autopsy report the weight of a decedent's spleen—where relatives were aware the decedent's spleen had been removed years prior to his death. *Id.* A special prosecutor appointed to investigate the misconduct said even a narrow examination of Erdmann's conduct reveled around 100 faked autopsies in a single county. *Id.* The special prosecutor noted, "[i]f the prosecution theory was that the death was caused by a Martian death ray, then that was what Dr. Erdmann reported." Richard L. Fricker, *Pathologist's Plea Adds to Turmoil: Discover of Possibly Hundreds of Faked Autopsies Helps Defense Challenges*, 79 A.B.A.J. 24 (March 1993). In spite of this bias, Erdmann on several occasions determined individuals had died of natural causes when in fact they had been killed. *See, e.g.*, Geoffrey A. Campbell, *Erdmann Faces New Legal Woes: Pathologist Indicted for Perjury in Texas Murder Trial*, 81 A.B.A.J. 32 (November 1995); *Couple Indicted on Murder Charges*, DALLAS MORNING NEWS,

March 24, 1993, at 14D, *available at* 1993 WLNR 4862381. In addition, he also exaggerated his credentials, claiming to be a ballistics expert. Suro, *Ripples,* N.Y. TIMES, November 22, 1992 at 22, *available at* 1992 WLNR 3309847.

Los Angeles, California: In Los Angeles, a police chemist failed to follow basic protocols for drug tests: he did not weigh drugs separately from the containers in which they were seized. *See* Anna Gorman, *LAPD Narcotics Analyst Erred: Botched Evidence Raises Question on Credibility. Public Defender's Office Demands an Accounting*, L.A. TIMES, Sept. 2, 2004, at B1, *available at* 2004 WLNR 19731216. After the error was ultimately discovered in one case, a preliminary review of the analyst's prior work was conducted and revealed problems in 47 additional cases, and subsequently lead to a review of all 972 drug cases in which he was involved. *Id.* The chemist had started at the crime lab analyzing blood and urine evidence before moving to narcotics. *Id.*

Mississippi: A forensic dentist represented that he could "match" bite marks, tool marks, shoe prints, fingernail imprints, and knife wounds using a method he dubbed, after himself, the "West Phenomenon." Marcia Coyle, *"Expert" Science under Fire in Capital Cases; Daubert vs. Frye*, NAT. L.J., July 11, 1994, at A1. The "West Phenomenon" involved using an alternate light source to analyze the wounds; his methodology could neither be reproduced nor photographed. *Id.* The forensic dentist's misconduct was acknowledged two years after a defense attorney complained to the American Academy of Forensic Sciences, which found West misrepresented data to bolster the acceptance of his technique and that his testimony was misleading in its certainty as well as its methodology. *Id.* Other review boards thereafter criticized his testimony and his methodology. *Id.*

Montana: An exoneration revealed the faulty and invented statistical analysis for hair evidence by the founder and

director of the Montana state police crime laboratory had resulted in at least two additional wrongful convictions. An independent review board reviewed the examiner's testimony and concluded he had demonstrated a "fundamental lack of understanding" of hair comparisons. *See* Innocence Project, PEER REVIEW REPORT: *Montana v. Jimmy Ray Bromgard*, *available at* http://www.innocenceproject.org/docs/bromgard_print_version1.html; Adam Liptak, *States to Review Lab Work of Expert Who Erred On ID*, N.Y. Times, Dec. 19, 2002 at A24, *available at* 2002 WLNR 3550147. After his shoddy work was exposed in Montana, the Montana crime laboratory director moved to Washington to conduct drug analysis work. Ruth Teichroeb, *Counties to Be Told of Crime Lab Flaws*, SEATTLE POST-INTELLIGENCER, March 17, 2004, *available at* http://seattlepi.nwsource.com/local/165129_crimelab17.html. When his past became known, an internal review of his drug analysis work revealed additional methodology problems. The reviewer described the forensic work as "sloppy" and "built around speed and shortcuts." *Id.*

Oklahoma City, Oklahoma: In Oklahoma, in multiple criminal cases over the course of a decade, a forensic chemist failed to follow basic scientific method, misrepresented qualifications, contaminated evidence, misreported test results, withheld evidence from the defense, and drew conclusions beyond bounds of accepted science. *See McCarty v. State*, 765 P.2d 1215, 1218-19 (Ok. Ct. Crim. App. 1988); *McCarty v. State*, 114 P.3d 1089, 1093 n. 19 (Ok. Ct. Crim. App. 2005); *see also*, Special Agent Douglas Deedrick, *Summary of Case reviews Of Forensic Chemist, Oklahoma City Police Department Crime Laboratory* (April 4, 2001), *available at* http://www.pdsdc.org/resources/dna/Summary_of_case_reviews_for_Joyce_Gilchrist.pdf

Virginia: After an exoneration in Virginia, the governor directed the state laboratory to allow an audit by the American Society of Crime Laboratory Directors ("ASCLD"). The

audit found that crime laboratory examiners interpreted DNA tests erroneously, deviated from standard protocols, and were subject to pressure to reach results consistent with the prosecution case, rather than conducting neutral scientific analysis. *See* American Society of Crime Laboratory Directors, LIMITED SCOPE INTERIM INSPECTION REPORT OF THE VIRGINIA DIVISION OF FORENSIC SCIENCE CENTRAL LABORATORY (April 9, 2005), *available at* http://www.innocenceproject.org/docs/VA_ASCLD_Audit_Report.pdf; Steve Mills, *Top Lab Repeatedly Botched DNA Tests*, CHI. TRIB., May 8, 2005, at 8, *available at* 2005 WLNR 23379927 (describing American Society of Crime Laboratory Directors Report).

Washington: A review by journalists of various Washington state crime laboratories found multiple instances of contamination, sloppy reporting techniques, the use of "junk science," bias in favor of law enforcement, influence of law enforcement over laboratory workers, and concealment of botched tests at various Washington state patrol laboratories. *See* Ruth Teichroeb, *Rare Look Inside State Crime Labs Reveals Recurring DNA Test Problems*, SEATTLE POST-INTELLIGENCER, July 22, 2004, available at http://seattlepi.nwsource.com/local/183007_crimelab22.html; Ruth Teichroeb, *Oversight of Crime-Lab Staff Has Often Been Lax*, SEATTLE POST-INTELLIGENCER, July 23, 2004, *available at* http://seattlepi.nwsource.com/local/183203_crimelab23.html; Ruth Teichroeb, *Crime Labs Too Beholden to Prosecutors, Critics Say*, SEATTLE POST-INTELLIGENCER, July 23, 2004, *available at* http://seattlepi.nwsource.com/local/183227_labsolutions23.html.

West Virginia: After the DNA exoneration of Glen Dale Woodall, and the insurance investigation which resulted in a settlement of $1 million in Woodall's civil suit for false imprisonment, the Prosecuting Attorney for Kanawha County requested a judicial investigation into the work of the

serology department at the West Virginia Department of Public Safety; a separate investigation was conducted by the ASCLD. *See In Re Investigation of West Virginia State Police Crime Lab, Serology Division*, 438 S.E.2d 501, 503 (W.Va. 1993). The judge found misconduct on a massive scale: the serologist, Fred Zain, routinely overstated results, provided misleading statements about his results, failed to perform tests he claimed to have performed, failed to report exculpatory results, failed to follow-up on conflicting results, reported scientifically impossible or improbable results, and altered laboratory reports. *Id.* at 503. And his misconduct always favored the prosecution: the ASCLD team found, "when in doubt, Zain's findings would always inculpate the suspect." *Id.* at 512 n. 9. Contributing to the misconduct was the fact that Zain's supervisors ignored or concealed complaints about his work. *Id.* at 503-4. The ASCLD also concluded that laboratory operating procedures—which, among other things, did not require written documentation of methodology, lacked auditing requirements, lacked written protocols, and failed to follow accepted scientific protocols—"undoubtedly contributed to an environment within which [the serologist's] misconduct escaped detection." *Id.* at 504. After citing "shocking and . . . egregious violations" and the "corruption of our legal system," the judicial inquiry concluded, "as a matter of law, any testimonial or documentary evidence offered by Zain at any time in any criminal prosecution should be deemed invalid, unreliable, and inadmissible." *Id.* at 506, 508, 520.

Federal Bureau of Investigations Crime Laboratory: Allegations of wrongdoing and improper practices within the FBI by Supervisory Special Agent Frederic Whitehurst involving some of the most significant prosecutions of the 1990s prompted the Office of Inspector General to investigate the nation's most respected crime laboratory. *See*, OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE, THE FBI LABORATORY: AN INVESTIGATION INTO LABORATORY PRAC-

TICES AND ALLEGED MISCONDUCT IN EXPLOSIVES-RELATED AND OTHER CASES (April 1997), *available at* http://www.usdoj.gov/oig/special/9704a/index.htm ("1997 I.G. Report"). "FBI examiners had given scientifically flawed, inaccurate, and overstated testimony under oath in court; had altered the lab reports of examiners to give them a pro-prosecutorial slant, and had failed to document tests and examinations from which they drew incriminating conclusions, thus ensuring that their work could never be properly checked." John F. Kelly & Phillip K. Wearne, TAINTING EVIDENCE 2 (1998); *see also,* 1997 I.G. Report, Executive Summary, part I, section A.

The FBI laboratory and analysts have been criticized in divisions ranging from fingerprint analysis (for example, the FBI misidentification of Brandon Mayfield, a Portland, Oregon, lawyer as a perpetrator of the Madrid terrorist attack of March 11, 2004, Flynn McRoberts & Maurice Possley, *Report Blasts FBI Lab: Peer Pressure Led to False ID of Madrid Fingerprint,* CHI. TRIB., Nov. 14, 2004, *available at* 2004 WLNR 19808891), to comparative analysis of bullet lead (William A. Tobin & Wayne Duerfeldt, *How Probative is Comparative Bullet Lead Analysis?*, 17 CRIM. JUSTICE 26 (Fall 2002) (retired FBI examiner began questioning the scientific technique of bullet lead composition analysis)).

A 2004 Report by the Office of Inspector General focused on Jacqueline Blake, who worked in the DNA unit for two years after having worked in the serology division for the ten previous years. OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE, THE FBI LABORATORY: A REVIEW OF PROTOCOL AND PRACTICE VULNERABILITIES, (May 2004), *available at* http://www.usdoj.gov/oig/special/0405/final.pdf ("2004 I.G. Report"). In May 2004, she pleaded guilty to a misdemeanor charge of providing false information in her lab reports. Maurice Possley, et. al., *Scandal Touches Elite Labs,* CHI. TRIB., October 21, 2004 at 1, *available at* 2004 WLNR 19853005. Significantly, although the FBI lab was accredited

and subject to audits, it was not an audit that discovered Blake's malfeasance—rather, a colleague who was working late one night accidentally discovered Blake's inconsistent and improper documentation. 2004 I.G. Report, Executive Summary at ii.

Drug Enforcement Agency: Veteran chemist Anne Castillo of the Dallas, Texas, Drug Enforcement Agency Laboratory, which analyzes evidence for state and federal agencies in Texas, Alabama, Arizona, Louisiana, Mississippi, New Mexico and Oklahoma, admitted in 1996 to fabricating results and providing testimony for tests never performed. Peter Schoenburg & Steve McCue, *Controlled Substances*, 20 CHAMPION 34 (Dec. 1996). While DEA director Howard Schlesinger confirmed Castillo had fabricated test results for at least several months – affecting hundreds of cases – he admitted there was no way to determine for how long she had been doing so, as she had been with the laboratory for many years, and worked on a full range of controlled substance cases. *Hundreds of Drug Cases May Be in Jeopardy*, DALLAS MORNING NEWS, July 19, 1996, page 34, *available at* 1996 WLNR 6022514.